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## Giannella Lecture

### CORPORATE DECISIONMAKING AND THE MORAL RIGHTS OF EMPLOYEES: PARTICIPATORY MANAGEMENT AND NATURAL LAW

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#### I. INTRODUCTION

PARTICIPATORY management—the philosophy of involving employees in corporate decisionmaking—arguably is the most important industrial relations phenomenon of the last three decades.<sup>1</sup> It has been endorsed by such disparate figures as President Bill Clinton and Pope John Paul II.<sup>2</sup> Thousands of U.S. firms have adopted one form of employee involvement or another.<sup>3</sup> Although the long-term economic effects of participatory management are still unknown, it seems likely to play a dominant role in structuring U.S. labor relations for the foreseeable future.

Employee involvement programs in capital-owned firms usefully divide into two basic categories: operational participation and strategic par-

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1. “Participatory management” and “employee involvement” are used herein interchangeably as generic terms covering any program purporting to give employees a role in corporate decisionmaking.

2. See BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 127 (1992) (promising to “[h]elp workers gain more power in their companies’ day-to-day operations, the organization of their workplaces, and the type of compensation they receive”); POPE JOHN PAUL II, CENTESIMUS ANNUS ¶ 43 (1991) [hereinafter CENTESIMUS ANNUS], reprinted in PROCLAIMING JUSTICE & PEACE: PAPAL DOCUMENTS FROM *RERUM NOVARUM* THROUGH *CENTESIMUS ANNUS* 465 (Michael Walsh & Brian Davies eds., 1991) [hereinafter PROCLAIMING JUSTICE & PEACE] (stating that Catholic social teaching “recognizes the legitimacy of workers’ efforts to . . . gain broader areas of participation in the life of industrial enterprises”).

3. See Devki K. Virk, Note, *Participation with Representation: Ensuring Workers’ Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 730 n.3 (1994) (stating that some surveys have found “approximately 30,000 American employers have established some type of cooperative-management program”).

ticipation.<sup>4</sup> Operational participation refers to programs in which employee involvement is limited to day-to-day issues of productivity and working conditions at the plant level.<sup>5</sup> Some of these programs address issues of firm-wide scope, while others are concerned only with a small part of the production process within a particular plant.<sup>6</sup> Some provide indirect participation through worker representatives, while others provide direct participation.<sup>7</sup> Some require employee participation, while others are voluntary.<sup>8</sup> The degree of worker autonomy they provide also varies widely, although they uniformly prohibit employee involvement in strategic or policy decisions.<sup>9</sup> Quality circles and self-directed work teams, such as Saturn's well-known work teams, are the best-known examples of the phenomenon.<sup>10</sup>

Strategic participation refers to programs in which employees participate in major policy decisions, such as those traditionally viewed as falling within the realm of corporate governance.<sup>11</sup> Strategic participation exists in a number of countries, but the best-known example remains the German codetermination system of works councils and supervisory boards.<sup>12</sup> In the United States, however, strategic participation is rare and rudimentary.<sup>13</sup> The most famous example is United Auto Workers President Douglas Fraser's 1979 election to Chrysler's board of directors, which did

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4. The discussion herein is restricted to capital-owned firms, *i.e.*, those in which employees lack significant ownership interests. Although employee ownership obviously has great potential for affecting corporate governance, it is largely irrelevant to this Article. While employee-owners reasonably might expect a voice in corporate decisionmaking, such an expectation raises quite different issues when employees lack significant stock ownership. This Article, therefore, largely ignores questions relating to employee ownership.

5. See generally Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657 (1996) [hereinafter Bainbridge, *Participatory Management*] (explaining operational participation programs).

6. See *id.* at 658 (distinguishing between programs that grant employees power over large-scale decisions and programs that only grant limited power).

7. "Employee participation" refers to programs utilizing direct involvement by all affected workers, while "employee representation" refers to programs utilizing indirect involvement through worker representatives.

8. See Bainbridge, *Participatory Management*, *supra* note 5, at 658 (explaining that such programs vary in many ways).

9. See *id.* (stating that decisions that ordinarily fall within realm of corporate governance may be, but usually are not, delegated to employees).

10. See generally Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. (forthcoming 1998) [hereinafter Bainbridge, *Organizational Failures Analysis*] (providing typology of modern U.S. participatory management programs).

11. See Bainbridge, *Participatory Management*, *supra* note 5, at 658 (defining strategic participation programs).

12. For a discussion of the German codetermination system, see *infra* notes 350-60 and accompanying text.

13. See Everett M. Kassalow, *Employee Representation on U.S., German Boards*, MONTHLY LAB. REV., Sept. 1989, at 39, 39 (stating that codetermination is significantly less common in United States than in Germany).

not meet with enthusiastic endorsement by other union leaders or managers.<sup>14</sup>

The legal literature on participatory management, insofar as it is concerned with normative questions, is dominated by calls for some form of government-mandated employee participation in corporate decisionmaking.<sup>15</sup> Theodore St. Antoine, for example, wrote sympathetically of the prospect of mandatory German-style codetermination in this country.<sup>16</sup>

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14. See Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155, 155 (1982) [hereinafter Summers, *Codetermination*] (explaining that "[t]he Chrysler experiment has not been greeted with enthusiasm by either unions or employees"). Although generalization is risky, it is possible to identify a number of important differences between strategic participation in the United States and the German codetermination system. As in Germany, strategic participation in U.S. firms is uniformly organized on a representative basis, usually involving employee representation on the board of directors. See Kassalow, *supra* note 13, at 39 (stating that in both countries, strategic participation comes in form of employee board representation). In contrast to the German supervisory boards, with their one-half employee membership, however, U.S. boards usually have a very small minority (typically one to three members) of worker representatives. See *id.* at 40. United States companies also usually have substantial management representation on the board, which is not true of German supervisory boards. See JOHN L. COTTON, *EMPLOYEE INVOLVEMENT: METHODS FOR IMPROVING PERFORMANCE AND WORK ATTITUDES* 127 (1993) (noting that in most American companies, CEO acts as chairperson of board with other corporate officers as members). The critical difference, however, is the way in which employee representation comes into force. In the United States, employee representation is almost always the result of concessionary bargaining with a union. See Kassalow, *supra* note 13, at 39 (explaining that number of companies are "pressed by unions" to "accept employee board representation"). In contrast, sweeping statutory mandates created German codetermination. See *id.* (stating that source of employee board representation in Germany rests within "legal foundation").

15. Employees have no present legal right to the sort of participation envisioned by promandate scholars. To be sure, employees have a number of lawful methods of participating in corporate decisionmaking, if we define participation broadly to mean the ability to affect the outcome of decisions. Most of these, however, are quite indirect. Direct participation has traditionally been limited to the collective (and individual) bargaining process. Strategic management decisions have generally been beyond the scope of collective bargaining because unions have no right to strike over these issues. Participation rights today are therefore relatively limited without a company's willingness to grant such rights. In fact, some forms of employee involvement are arguably illegal under present law. See COTTON, *supra* note 14, at 128.

Participatory management programs implicate at least four core labor law doctrines: (1) the prohibition of company unions; (2) exclusive representation; (3) the legal differences between workers and managers; and (4) the distinction between mandatory, permissive and illegal bargaining subjects. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 234 (rev. ed. 1994). The extent to which these doctrines impede the development of participatory management is an unsettled question outside the scope of this Article, but it seems fair to project that litigation under the labor laws still poses some threat to the further expansion of participatory management in the United States.

16. See Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 660-61 (1985) (stating that "[p]art of the key to the future of federal labor legislation lies in the future of organized labor").

Marleen O'Connor went beyond mere sympathy for this idea, affirmatively urging not only that corporate law mandate employee participation committees resembling German works councils, along with a duty to disclose corporate information to employees,<sup>17</sup> but even that director fiduciary duties be created running to employees under the "neutral-referee model."<sup>18</sup> Other scholars have made similar proposals.<sup>19</sup> Richard Freeman and Joel Rogers advocate a slightly different interventionist model in which the government is to use taxation and other incentives to encourage employee participation.<sup>20</sup> David Levine has also proposed tax subsidies to participatory firms.<sup>21</sup> In her academic writings, former Council of Economic Advisors Chairperson Laura D'Andrea Tyson urged the federal government to adopt a variety of policies designed to encourage participatory management.<sup>22</sup>

The link between normative analyses of participatory management and calls for government intervention is hardly surprising. As I have demonstrated elsewhere, privately-ordered participatory management is a top-down phenomenon that serves the interests of shareholders and managers.<sup>23</sup> Absent government intervention, current employee involvement programs are unlikely to evolve in the directions supported by the aforementioned scholars. As a result, they focus on government mandates.

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17. See Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 961-63 (1993) [hereinafter O'Connor, *Human Capital Era*] (stating that directors should inform employers about issues traditionally categorized as managerial prerogatives).

18. See *id.* at 954-61 (stating that directors should owe fiduciary duty to provide severance pay, job training and similar benefits to laid-off workers).

19. See, e.g., Mark F. Nowak, *Worker Participation and its Potential Application in the United States*, 35 LAB. L.J. 148, 149 (1984) (calling for "grafting" European-style codetermination onto collective bargaining structure); Lewis D. Solomon & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. CORP. L. 331, 344-53 (1987) (proposing various legal changes designed to promote humanistic economy through employee participation).

20. See Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 13, 63-64 (Bruce A. Kaufman & Morris M. Kleiner eds., 1993) (stating that government should encourage participation with taxation).

21. See David I. Levine, *Public Policy Implications of Imperfections in the Market for Worker Participation*, 13 ECON. & INDUS. DEMOCRACY 183, 198-99 (1992) (stating that participatory firms should receive tax subsidies).

22. See David I. Levine & Laura D'Andrea Tyson, *Participation, Productivity, and the Firm's Environment*, in PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 183, 235-37 (Alan S. Blinder ed., 1990) (stating that just-cause employment policies and partial unemployment insurance for partial layoffs will encourage participatory management).

23. See Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (noting that benefits derived from participatory management flow primarily to managers and shareholders).

Normative analyses of participatory management by promandate scholars have developed two justifications for government intervention.<sup>24</sup> The first justification is economic, typically arguing that participatory management is an efficient system of organizing production that is nevertheless being thwarted by various market failures requiring governmental correction.<sup>25</sup> I have explored this argument elsewhere, concluding that government-mandated employee involvement cannot be justified on economic grounds.<sup>26</sup> In this Article, I evaluate the other promandate argument; namely, the claim that employees have a right to participate in corporate governance.<sup>27</sup>

On close examination, much of the normative literature on employee participation amounts to little more than "rights talk"; *i.e.*, political rhetoric dressed up in legal and/or moral rights terminology.<sup>28</sup> For ideologically motivated proponents of employee participation, this is a useful debating tactic because our culture's fixation with individual rights imbues any rights-based claim with an air of legitimacy and inconvertibility.<sup>29</sup> Using rights-based terminology to phrase the question, however, often impedes or even precludes meaningful analysis.<sup>30</sup>

The task before us is thus two-fold. First, we must subject the claim that employees have a right to participate in corporate governance to a rigorous process of specification and assessment.<sup>31</sup> Second, we must ask whether this right—as so specified—merits codification into positive law.

A right exists where a basic principle of natural law, or a rule derived therefrom, gives to one person or class the benefit of a positive or negative duty imposed upon some other person or class.<sup>32</sup> A right so defined, of

24. See Bainbridge, *Participatory Management*, *supra* note 5, at 673-730 (reviewing reasons for government intervention).

25. See *id.* at 680 (setting forth economic function of participatory management).

26. See *id.* at 730 (stating that "there is no economic justification for government intervention").

27. For a discussion of the claim that employees have a right to participate in corporate governance, see *infra* notes 119-61 and accompanying text.

28. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 198-223 (1980) [hereinafter FINNIS, *NATURAL LAW*] (discussing origins of rights talk); MARY ANN GLENDON, *RIGHTS TALK* 4-5 (1991) (same).

29. To be clear, although others might argue that scholarship with an ideological edge and agenda is inappropriate, my argument herein is unabashedly that of a conservative (in the Tory rather than libertarian sense) Protestant. Instead, my point is only that analysis is clearer when pre-analytic moral and political assumptions are laid bare.

30. See GLENDON, *supra* note 28, at 171-73 (stating that rights-talk rhetoric impedes deliberation).

31. See FINNIS, *NATURAL LAW*, *supra* note 28, at 218 (stating that "most assertions of right made in political discourse need to be subjected to a rational process of specification, assessment, and qualification, in a way that rather belies the pre-emptory or conclusory sound of '... have a right to'").

32. See *id.* at 205 (defining when rights exist). Thus, my focus narrows to only one of the four Hohfeldian categories of rights, *i.e.*, the claim right or right *stricto*

course, is not necessarily part of positive law. As Holmes observed, “nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.”<sup>33</sup> The conditions to be satisfied before such a right is to be codified, therefore, must also be defined. As I shall argue below, this task requires us to focus on moral norms—statements about right and wrong—that have sufficiently substantial support in the community to justify the creation of a legal right.

This Article is an exercise in applied natural law, not a discourse on basic theory. Because my version of natural law jurisprudence is somewhat unconventional and because natural law is rarely invoked in connection with corporate governance, a brief statement of foundational premises seems appropriate, if only in the interest of transparency. Accordingly, Part II outlines the analytical framework to be used throughout the Article.<sup>34</sup>

The remainder of the Article is devoted to a natural law-based analysis of claims that employees are entitled to participate in corporate decision-making processes.<sup>35</sup> I have two principal foils in these sections. The first is Roman Catholic social teaching on work and capitalism, which offers the most fully realized statement of natural law principles applicable to the problem at hand.<sup>36</sup> The second is a body of literature to which I will refer as secular humanist.<sup>37</sup> This literature draws mainly on precepts of humanistic psychology.<sup>38</sup> Although scholars approaching the problem from this angle are not working within a natural law paradigm, their work deserves examination both because it has certain similarities to Catholic social teaching and because it represents the other dominant theory upon which rights-based claims are made in support of government-mandated participatory management.

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*sensu*. See *id.* at 199 (listing four categories of rights). My focus also rejects the “choice” or “active rights” theory of rights espoused by scholars such as H.L.A. Hart and Richard Tuck. See generally Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL’Y 695, 698-99 (1997) (discussing difference between rights and duties, and this relationship to rights talk).

33. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

34. For an outline of the analytical framework that will be used in the remainder of this Article, see *infra* notes 58-118 and accompanying text.

35. For a natural law-based analysis of claims that employees are entitled to participate in corporate decisionmaking processes, see *infra* notes 119-61 and accompanying text.

36. For a discussion of Roman Catholic social teaching on work and capitalism, see *infra* notes 119-218 and accompanying text.

37. For a discussion of secular humanist literature, see *infra* notes 219-91 and accompanying text.

38. See Lewis D. Solomon, *Perspectives on Human Nature and Their Implications for Business Organizations*, 23 FORDHAM URB. L.J. 221, 221 (1996) [hereinafter Solomon, *Perspectives*] (discussing term “humanistic psychology” in reference to secular humanist theory).

To be clear, this Article is not intended as an exegesis of Catholic social teaching. My primary concern is with the policy implications of that teaching, not its theology. If Catholic social teaching was limited to doctrinal statements about the moral conduct expected of Roman Catholic capitalists and laborers, it would have little to say to those of us outside that tradition. Much of the relevant literature, however, purports to speak not only to Roman Catholics, but also to society at large. This is especially true of the well-known U.S. Bishops' pastoral letter *Economic Justice for All*,<sup>39</sup> which was intended to affect public policy debates on a host of economic issues.<sup>40</sup> Although the relevant papal encyclicals are somewhat more circumspect in their policy implications, they also purport to state natural law principles applicable to all.<sup>41</sup> Thus, my question is not whether the Bishops' pastoral letter or the encyclicals are accurate statements of Catholic social teaching, but whether they make a case for translating into positive law the natural law claims they set forth.

Catholic social teaching identifies three areas in which employees may be entitled to participate in corporate decisionmaking: social, personal and economic.<sup>42</sup> Social matters include working conditions, wages and benefits, training, job design and similar matters.<sup>43</sup> Personal matters include personnel decisions, such as hiring and firing, promotions, layoffs and similar matters.<sup>44</sup> Economic matters include firm investments, board representation, mergers, lines of business, profits, dividends, restructur-

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39. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986) [hereinafter *BISHOPS' LETTER*], reprinted in *THE CATHOLIC CHALLENGE TO THE AMERICAN ECONOMY: REFLECTIONS ON THE U.S. BISHOPS' PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* app. (Thomas M. Gannon ed., 1987) [hereinafter *THE CATHOLIC CHALLENGE*]. Specific policy statements, such as those found in the *Bishops' Letter*, are properly viewed (even by Catholics) as prudential judgments about how the social teaching applies to the problem at hand. See CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 227 (1993) (explaining that American Bishops use social teachings in determining stance on specific issues). Even devout Catholics are free to question such judgments, because the "bishops, as bishops, 'have no greater insight into policy matters than anyone else.'" *Id.* (quoting J. Brian Benestad, *Catholic Social Teaching, Political Philosophy and Pope John Paul's Laborem Exercens*, in *PROCEEDINGS OF THE FIFTH CONVENTION OF THE FELLOWSHIP OF CATHOLIC SCHOLARS* 59 (1982)).

40. See *BISHOPS' LETTER*, *supra* note 39, ¶ 27, reprinted in *THE CATHOLIC CHALLENGE*, *supra* note 39, app. (stating that "[w]e ask you to become more informed and active citizens, using your voices and votes to speak for the voiceless").

41. See John Finnis, *Liberalism and Natural Law Theory*, 45 *MERCER L. REV.* 687, 690 (1994) [hereinafter Finnis, *Liberalism*] (noting that relevant papal encyclicals state that natural law principles are applicable to all).

42. See Michael J. Naughton, *Participation in the Organization: An Ethical Analysis from the Papal Social Tradition*, 14 *J. BUS. ETHICS* 923, 925 (1995) [hereinafter Naughton, *Participation in the Organization*] (noting that employees may be entitled to participate in three areas of corporate decisionmaking).

43. See *id.* (defining social matters).

44. See *id.* (defining personal matters).



ings and similar matters.<sup>45</sup> The initial papal view, as exemplified by Pius XII's reaction to German codetermination, was that employees have a natural right to participate in decisions relating to social and personal matters, but not economic matters.<sup>46</sup> The more recent Bishops' pastoral letter, in contrast, at least implicitly endorsed worker participation in all three areas.<sup>47</sup> Outside the Catholic tradition, the secular humanist literature almost uniformly claims that workers are entitled to participate in all three areas.<sup>48</sup>

Although the relevant Catholic social teachings and secular humanist arguments are complex and nuanced, both fairly can be said to emphasize two basic claims. First, participation is asserted to be an essential mechanism for full development of human personality.<sup>49</sup> Self-realization and self-actualization are the conceptual engines driving this claim.<sup>50</sup> I evaluate this claim in Part III of this Article.<sup>51</sup> Second, participation is posited to be an essential feature of human dignity.<sup>52</sup> Because merely invoking the broad concept of human dignity does little to promote the necessary process of specification and assessment, Part IV extracts from the relevant literature three basic ways in which participation might advance human dignity.<sup>53</sup> First, participation may promote trust between employers and employees.<sup>54</sup> Second, participation promotes workplace democracy.<sup>55</sup> Third and finally, participation rights may protect employees from opportunistic conduct by employers.<sup>56</sup> As I argue in Part IV, only the final the-

45. See *id.* (defining economic matters).

46. See *id.* at 926 (stating that "Pius XII was adamant that a natural right to economic participation violates owners' rights to private property").

47. See BISHOPS' LETTER, *supra* note 39, ¶¶ 13-15, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, app. (asserting that all people have right to participation generally, including in economic matters).

48. See Solomon, *Perspectives*, *supra* note 38, at 242-46 (advocating workers' right to participate).

49. See *id.* at 222-28 (citing ability to participate as important element to human personality development).

50. See *id.* (noting that desire for self-realization and self-actualization creates need to participate).

51. For a discussion of the claim that participation is essential for the full development of the human personality, see *infra* notes 222-30 and accompanying text.

52. See Solomon, *Perspectives*, *supra* note 38, at 222-28 (noting that participating in life's decisions is important part of human dignity).

53. For a discussion of the three basic ways in which participation might advance human dignity, see *infra* notes 307-09 and accompanying text.

54. For a discussion of how participation may promote trust between employers and employees, see *infra* notes 310-431 and accompanying text.

55. For a discussion of how participation promotes workplace democracy, see *infra* notes 432-74 and accompanying text.

56. For a discussion of how participation rights may protect employees, see *infra* notes 475-549 and accompanying text.

ory rises to the level of plausibility, and it still can not justify government-mandated employee participation.<sup>57</sup>

## II. MORAL RIGHTS AND NATURAL LAW

Law consists in the first instance of a set of doctrinal propositions; *i.e.*, the legal rules derived from statutes, judicial precedents and *opinio juris*. Legal reasoning is more than the mere identification and manipulation of doctrinal propositions, however, because doctrine itself is inextricably linked with morality and policy. The doctrinal propositions of which law consists thus rest on a tripod whose legs are: moral norms, which characterize conduct as right or wrong;<sup>58</sup> policy, which characterizes states of affairs as good or bad in light of the general welfare of society;<sup>59</sup> and experience, which teaches us the way the world works.<sup>60</sup> Although all three are important, moral norms have special relevance to evaluating asserted rights because it is morality itself that shapes our perceptions of what constitutes an injury for which one has a right to redress.<sup>61</sup>

Skeptics claim that moral norms are indeterminate, abstract and undemocratic in a pluralistic society.<sup>62</sup> None of these claims, however, is fatal to my project. Unless one insists on unanimity, it remains possible to identify many moral norms as to which majority consensus exists.<sup>63</sup> Most people still believe, for example, that promises should be kept and that

57. For a discussion of the plausibility of the third theory, see *infra* notes 541-49 and accompanying text.

58. Moral norms are to be distinguished from the concept of social norms. The burgeoning and important literature on the latter commonly defines social norms as "rules or standards enforced solely by private (that is, non-state) actors." Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1914 n.1 (1996) [hereinafter Rock & Wachter, *Enforceability of Norms*].

59. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 26 (1988) (stating that "[p]olicies characterize states of affairs as conducive or adverse to the general welfare").

60. See *id.* at 37 (stating that "[e]xperiential propositions are propositions about the way the world works"). Note that I am generalizing an analysis that Eisenberg restricted to common law adjudication.

61. See *id.* at 14-15 (discussing moral norms in common law and stating that morality largely shapes our perceptions of what constitutes injuries and rights). Some natural law jurists, of course, would assert that I am putting the cart before the horse. An important strain of natural law thinking denies that a positive law contrary to the precepts of natural law is even a law. "It is void, an act of violence rather than law." RICE, *supra* note 39, at 30. For a more nuanced account, see FINNIS, *NATURAL LAW*, *supra* note 28, at 354-62 (discussing effects of injustice on obligation to obey law).

62. See generally Russell Mittinger, *Distinguishing Between Constitutional Art and Morals*, 4 S. CAL. INTERDISC. L.J. 567, 567 (1995) (discussing views of natural law skeptics generally).

63. Although some minorities may hold values different from those of the majority, this does not foreclose the use of moral norms in lawmaking "as long as the community is not exceptionally pluralistic and the norms claim to be rooted in aspirations for the community as a whole." EISENBERG, *supra* note 59, at 21.

lying is wrong. This consensus as to basic social morality permits one to "reach a pretty firm sense of what most people would regard as fair in a given case."<sup>64</sup>

The claim that moral norms are indeterminate is contradicted by experience, as Melvin Eisenberg has argued:

Moral norms such as "promises should be kept" and "lying is wrong" are neither vacuous nor susceptible to any interpretation. Furthermore, this argument confuses the definition of a concept and the instances that fall under it. People who are not expert at systematization often cannot give a satisfactory definition of a concept even though they can easily identify cases falling under it.<sup>65</sup>

The latter point, reminiscent of Justice Stewart's famous remark about obscenity, is perhaps the most interesting aspect of Eisenberg's defense of social morality.<sup>66</sup> It may be enough to know a moral norm when we see it, even if we cannot state the norm with the precision one expects of moral philosophers or theologians.

To be relevant to lawmaking, a moral norm must satisfy two conditions: 1) it must be supported by the relevant community or society and 2) it must be true. The requirement of social support is not wholly uncontroversial, but can be justified on various grounds. Perhaps the most telling is the simple point that laws based on moral norms lacking social support will fail their intended purpose. For example, regardless of the truth or falsity of the temperance norm, Prohibition failed in large measure because the moral norms invoked to justify the 18th Amendment lost social support.<sup>67</sup>

The requirement that a moral norm be true is far more controversial.<sup>68</sup> Skeptics deny that the truth of a moral norm can be established.<sup>69</sup>

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64. *Id.* A caveat is in order. Moral norms are very useful in defining broad rules of general application and even for defining narrow rules applicable to issues involving profound questions of morality, but they are a blunt instrument poorly suited to fine detail work in the interstices of commercial law. As such, even if I were persuaded that employees have a moral right to participate in corporate governance, I am doubtful that moral norms would tell us very much about the particular form such participation should take.

65. *Id.*

66. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material . . . embraced . . . [by the term 'hard core pornography']; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.")

67. See Paul M. Robinson, *One Perspective on Sentencing Reform in the United States*, 8 CRIM. L.F. 1, 33 (1997) (describing how change of community norms can cause changes in law).

68. See Mittinger, *supra* note 62, at 567 (discussing requirement that moral norms be true).

69. See *id.* (discussing skeptics' view).

At best, they regard moral norms as indeterminate “can’t helps.”<sup>70</sup> Yet, the genuine immorality of an act is a necessary, but not sufficient, condition for the legitimacy of its legal prohibition.<sup>71</sup> Because all conceptions of good necessarily invoke nonderivable moral assumptions, we cannot avoid an inquiry into the morality of an act we propose to regulate.<sup>72</sup>

To be sure, the truth of moral norms and their support in the community are necessarily intertwined. Laws *mala in se* derive their legitimacy from ideals—justice, love, liberty—that have traction precisely because they are based in a common belief in the truth of some abstract principle.<sup>73</sup> Thus, community support is evidence of a norm’s validity, while the ability of a given norm to command such support depends on whether it is true.

At the same time, however, truth and social support ultimately must be kept separate. Failing to do so leads inevitably to the contractualist fallacy; namely, the position that moral norms are simply an agreement among members of society.<sup>74</sup> Russell Kirk characterized Edmund Burke’s vision of natural rights as not merely a matter of convention, but as “human custom conforming to divine intent.”<sup>75</sup> Unconstrained contractualism, in contrast, makes lawmaking a mere popularity contest among competing political positions clothed in the language of rights. Inevitably, the lowest common moral denominator will prevail.<sup>76</sup> Indeed, as Pope

70. See Richard Posner, *Lecture: 1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1675 (1998) [hereinafter Posner, *Problematics*] (describing example of moral norm as “can’t helps”); see also Gerald V. Bradley, *Law and Economics: Overcoming Posner*, 94 MICH. L. REV. 1898, 1909 (1996) (book review) [hereinafter Bradley, *Law and Economics*] (referring to Holmes’s “can’t helps” as value judgments). For a more thorough explanation of Holmes’s “can’t helps” theory, see *id.* at 1912-15.

71. See Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of MAKING MEN MORAL*, 71 NOTRE DAME L. REV. 671, 674 (1996) [hereinafter Bradley, *Pluralistic Perfectionism*] (stating that immorality is necessary, but not sufficient, for legal prohibition).

72. See Bobby Jindal, *Relativism, Neutrality, and Transcendentalism: Beyond Autonomy*, 57 LA. L. REV. 1253, 1253 (1997) (stating that “any justification for acting in a non-random manner involves non-derivable morality”).

73. See *id.* (stating that “whether one appeals to justice, love, value of human life, etc., one is appealing to a common belief in some abstract principle of good”).

74. See Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 708 (1993) (stating that moral norms should reflect agreement among members of society). Contractualism’s principal virtue is that linking wide social support for a moral norm to truth claims implicates both notions of consent—“persons should be bound only by what they have agreed to”—and notions of rationality—norms that rational people are willing to accept are themselves rational. *Id.* Hence, my view is that strong social support for a particular moral norm is evidence that it may be true, although not dispositive of its truth.

75. RUSSELL KIRK, *THE CONSERVATIVE MIND FROM BURKE TO ELIOT* 50 (7th rev. ed. 1993) [hereinafter KIRK, *CONSERVATIVE MIND*].

76. Note that contractualism also runs afoul of public choice theory, especially Arrow’s Impossibility Theorem, which postulates that there is no way to aggregate individual preferences that satisfies such basic requirements as transitive

John Paul II observed, "if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power."<sup>77</sup> At its worst, contractualism leads to the sort of totalitarianism exemplified by Revolutionary France in whom the state, embodying the "general will," subjugated both faith and conscience.<sup>78</sup> The social contract degenerated into nothing more than an accord among those who had the power to impose their will on others.<sup>79</sup>

How then shall the truth of a moral norm be established? The various schools of natural law offer three sources: revealed truth, practical reasoning and the traditions of the community.<sup>80</sup> All three shall be treated as grist for the mill herein.

Natural law consists of "a loosely-knit body of rules of action prescribed by an authority superior to the state."<sup>81</sup> But what authority? Burke contended that "[m]an's rights exist only when man obeys God's law" towards which we grope feebly and imperfectly.<sup>82</sup> I thus submit that most people believe that promises should be kept and lying is wrong because those norms are revealed truths affirmed by the foundational religious texts of our culture.

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preferences and *pareto* optimality. See Raj Bhala, *Equilibrium Theory, The FICAS Model, and International Banking Law*, 38 HARV. INT'L L.J. 1, 38 (1997) (providing broad definition of Professor Arrow's theory). For a general study of Professor Arrow's work, see GEORGE FEIWEL, *ARROW AND THE THEORIES OF ECONOMIC POLICY* (1987).

77. CENTESIMUS ANNUS, *supra* note 2, ¶ 46.2, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 468.

78. See David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1397 (1990) (book review) (contrasting totalitarian France with views of American founders).

79. See RICE, *supra* note 39, at 37-38 (explaining how strict accordance to natural law encourages individual rights rather than incarnating general will by following divine command).

80. Russell Kirk offers a somewhat more elaborate panoply, positing that the various schools of natural law derive the rules thereof from "divine commandment, from right reason with which man is endowed by his Creator, from the nature of mankind empirically regarded, from the abstract Reason of the Enlightenment, or from the long experience of humankind in the community." Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994) [hereinafter Kirk, *Tension*]. In the interests of brevity, I have chosen to collapse the three central categories into one or, perhaps more precisely, to ignore the distinctions among them.

81. *Id.*

82. KIRK, CONSERVATIVE MIND, *supra* note 75, at 49.

Because legal elites are largely secular in outlook,<sup>83</sup> as are most modern American elites,<sup>84</sup> arguments founded on revealed truths inevitably have little traction in the academy. Yet, large segments of our society still look to their sacred texts for answers to moral problems—and find them.<sup>85</sup> Indeed, although our society admittedly is increasingly pluralistic, “the democratic reality, even, if you will, the raw demographic reality, is that most Americans derive their values and visions from the biblical tradition.”<sup>86</sup> This is especially true of such seemingly disparate groups as Protestant Evangelicals, Roman Catholics and Orthodox Jews.<sup>87</sup> At the very least, those skeptical of the claims of faith must therefore concede that moral norms affirmed by the foundational texts of Judaism and Christianity are strong evidence that such norms have considerable support in our culture.

A second, long dominant, strain of natural law jurisprudence relies not on revealed truths, but mainly (or even solely) on human reason.<sup>88</sup> Natural law originated with the Greek philosophers, especially Aristotle, and it was universalized by the Stoics and further developed by the Romans.<sup>89</sup> As such, natural law was linked with reason, not religion. Cicero wrote, for example, “True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts wrongdoing by its prohibitions.”<sup>90</sup>

Although natural law was eventually allied with Christianity, most notably by St. Thomas Aquinas, the natural law mainstream still emphasizes

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83. See Thomas Shaffer, *The Tension Between Law in America and the Religious Tradition*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* 315, 327 (John Witte, Jr. & Frank S. Alexander eds., 1988) (stating that “modern law schools . . . have systematically—theologically!—discounted, discouraged and disapproved of the invocation of the religious tradition as important, or even interesting”).

84. See CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 215 (1995) (stating that “[t]he elites’ attitude to religion ranges from indifference to active hostility”).

85. See Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1509 (1989) (book review) [hereinafter McConnell, *Role of Democratic Politics*] (stating that Orthodox Jews, Amish and fundamentalists “look to their sacred texts for ‘answers’ to specific questions—and find them”).

86. RICHARD NEUHAUS, *THE NAKED PUBLIC SQUARE* 139 (2d ed. 1986).

87. See McConnell, *Role of Democratic Politics*, *supra* note 85, at 1509-10 (stating that Evangelicals, Roman Catholics and Orthodox Jews “use scripture as a vantage point for criticizing present-day institutions and practices”). Roman Catholics share the Evangelical and Orthodox beliefs in the existence of revealed truths, but find such truths in both the Bible and the teachings of the Church. See *id.* at 1510 (explaining differences between religious viewpoints).

88. See generally RICE, *supra* note 39, at 30 (defining natural law).

89. See *id.* at 30-36 (discussing history of natural law).

90. David F. Forte, *Eve Without Adam: What Genesis Has to Tell America About Natural Law*, THE RUSSELL KIRK MEMORIAL LECTURE PRESENTED TO THE HERITAGE FOUNDATION (visited May 1, 1996) <<http://townhall.com/heritage/library/categories/theory/lect570.html>> (quoting Cicero’s *De Republica* 3:21).

reason.<sup>91</sup> Religiously grounded natural law jurists, of course, do not reject the claims of revealed truth.<sup>92</sup> Some believe that human reason is the means by which we refine our understanding of divine instruction.<sup>93</sup> Burke contended, for example, that there are “eternal enactments of divine authority which we can endeavor to apprehend through the study of history and the observation of human character.”<sup>94</sup> Others, however, assign revealed truth to the category of faith, and natural law to the category of reason, and the two are then asserted to be compatible, even though distinct.<sup>95</sup>

Although I find the former school of thought more congenial than the latter, revealed truths admittedly tell us relatively little about the specific problem at hand. Accordingly, I rely herein mainly on what John Finnis refers to as the test of practical reasonableness.<sup>96</sup> Practical reason is

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91. *See id.* With specific regard to Catholic social teaching on the economy, Charles Curran observed that it initially “saw all of social, political and economic life in the light of the natural law and did not appeal directly and explicitly to the gospel, redemption, grace, or Jesus Christ.” Charles E. Curran, *Relating Religious-Ethical Inquiry to Economic Policy*, reprinted in *THE CATHOLIC CHALLENGE*, *supra* note 39, at 42, 43. Many natural law jurists rely similarly on reason and their understanding of human nature to identify moral principles without invoking revealed truths of divine origin. *See, e.g.*, Philip E. Johnson, *Some Thoughts About Natural Law*, 75 CAL. L. REV. 217, 217 (1987) (distinguishing natural law from divine law); *see also* Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2394, 2404-05 (1992) (identifying “the insistence that moral principles are objectively valid and discoverable by reason” as characteristic of natural law and identifying religious connotations of natural law as one reason for skepticism about it).

92. *See* RICE, *supra* note 39, at 29 (stating that natural law and revelation complement each other).

93. *See* Soper, *supra* note 91, at 2406 (discussing moral truths and reason).

94. KIRK, *CONSERVATIVE MIND*, *supra* note 75, at 49.

95. *See, e.g.*, RICE, *supra* note 39, at 29 (stating that “natural law and revelation complement each other”); Forte, *supra* note 90 (stating that “[w]estern civilization was built upon both reason and faith: the faith of the Judeo-Christian revelation and the reason that discovered and applied the natural law”).

96. *See* FINNIS, *NATURAL LAW*, *supra* note 28, at 100-27 (discussing test of practical reasonableness). Practical reasonableness is only part of Finnis’s jurisprudence of natural law, the totality of which appears to consist mostly of lists. He begins with seven “basic values”: life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion. *See id.* at 86-90. In turn, the test of practical reasonableness consists of nine requirements: a coherent plan of life, no arbitrary preferences among value, no arbitrary preferences among persons, detachment, commitment, efficiency, respect for every basic value in every act, the common good and following one’s conscience. *See id.* at 103-26. Each of the seven basic values is said to be of equal importance, and Finnis denies that it is possible to rank them. *See id.* at 92-93. Instead, an important component of practical reasonableness is making decisions in a way that does not directly damage any of the seven basic values. *See id.* at 119-20. Because Finnis defines natural law as being concerned with “good and proper conduct,” not drafting positive legislation, he is willing to accept the resulting indeterminacy. *Id.* at 18. For a criticism of Finnis’s list of basic values and definition of practical reasonableness, see William H. Wilcox, *Natural Law and Natural Rights*, 68 CORNELL L. REV. 408, 408-20 (1983) (book review) (criticizing Finnis’s test of practical reasonableness).

a way of thinking about how things ought to be, using rational arguments about how people ought to behave.<sup>97</sup> Alternatively, as Finnis put it, practical reasoning is the natural law method of “working out the (moral) natural law from the first (pre-moral) principles of natural law.”<sup>98</sup> In particular, it is a way of choosing “commitments, projects, and actions, knowing that choice effectively rules out many alternative reasonable or possible commitment(s), project(s), and action(s).”<sup>99</sup> As this definition implies, practical reason alone cannot be dispositive when making public policy rather than personal moral choices. As Finnis acknowledged, “the integration of even an uncontroversial requirement of practical reasonableness into the [positive] law will not be a simple matter.”<sup>100</sup> It is a starting point, not a conclusion.

Practical reasonableness should not be confused with a purely instrumental explanation for moral norms. Moral norms involve making judgments about right and wrong, which is inconsistent with a purely instrumental understanding of norms. In addition, providing an *ex post* instrumental justification for a moral norm is not the same as providing an *ex ante* account of how and why the norm came into existence.

At the same time, however, an instrumental analysis can be instructive. Although cost-benefit analysis may strike a discordant note in an essay on moral norms, efficiency is a basic element of practical reasoning. One should seek to achieve the good by actions that are efficient for their purposes: “One must not waste one’s opportunities by using inefficient methods.”<sup>101</sup> Cost-benefit analysis thus comes into play not only as a policy-based argument potentially capable of trumping moral norms, but also within the task of specifying and assessing claimed moral norms.

Although practical reason is a useful guide, it flirts with a grave danger; namely, the triumph of individual reason. Burke contended that individual reason could never fully comprehend the divine intent, although we grope towards it through history, myth, fable, custom and tradition.<sup>102</sup> Of these, tradition and custom are the most important.

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97. See Steven J. Burton, *Judge Posner’s Jurisprudence of Skepticism*, 87 MICH. L. REV. 710, 715 (1988) (stating that practical reason focuses on what “ought” to be).

98. FINNIS, NATURAL LAW, *supra* note 28, at 103 (internal quotation marks omitted).

99. *Id.* at 100.

100. *Id.* at 283-84.

101. *Id.* at 111. To be sure, Finnis constrains the efficiency criterion by reference to other moral criteria. See *id.* at 112 (stating that calculating most efficient course is complicated by various considerations, such as moral constraints on human behavior).

102. See KIRK, CONSERVATIVE MIND, *supra* note 75, at 50 (stating that “the experience of the species is taught to us not only through history, but through myth and fable, custom and prejudice”).



Tradition often has a hard time withstanding the assaults of individual reason.<sup>103</sup> Yet, tradition—even if seemingly foolish—has extraordinary value.<sup>104</sup> First, tradition provides a solution for the risk of value disagreement, which modern scholars typically regard as a major problem for natural law-based jurisprudence.<sup>105</sup> Philip Soper, for example, opined that “[i]f we accept that natural law is just another way of claiming that ethical statements can be true or false, then we will have to recognize that people who accept the theory can nevertheless reach different conclusions about fundamental moral questions with no clear way of judging among them.”<sup>106</sup> To those natural law scholars who invoke revealed truth as a means of making such judgments, Soper responds by asserting that associating natural law and faith offers good grounds for being skeptical of the former.<sup>107</sup> If so, however, the traditions of the community provide an alternative standard for identifying moral truths that does not require one to accept the claims of any particular faith.

Second, respect for tradition is closely linked to the virtue of prudence.<sup>108</sup> Edmund Burke echoed Plato in his assertion that prudence was the chief virtue of true statesmen.<sup>109</sup> Prudence requires a degree of consequentialist reasoning that some natural law scholars, such as Finnis, find troubling.<sup>110</sup> When the question of codifying purported natural rights

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103. See McConnell, *Role of Democratic Politics*, *supra* note 85, at 1506 (stating that “[a]n excess of ‘self-critical rationality’ is death to tradition”).

104. Incorporating traditional values into natural law implicates the enduring question of “whether natural law implies the existence of universal moral truths that make the theory incompatible with theories that recognize cultural or social variation in ethical ‘truth.’” Soper, *supra* note 91, at 2395 n.4. My own view, for what it is worth, is that some truths are universal—prohibitions against murder and incest being good examples—while others are culturally bound. The genesis of my position is St. Paul’s comment that he became “all things to all men,” which implies that he was willing to accommodate cultural variations that did not offend the universal moral truths to which he was committed. 1 Cor. 9:22.

105. See, e.g., Soper, *supra* note 91, at 2405 (discussing risk of value disagreements among those who accept theory of natural law).

106. *Id.* Notice that Soper’s invocation of value disagreements as a problem for natural law implicitly includes a pre-analytic assumption of individual autonomy and the legitimacy of individual reason.

107. See *id.* (stating that skepticism of natural law theory is rooted in failure to “distinguish between faith and reason as the basis for one’s claim about moral truth”).

108. See RUSSELL KIRK, *THE POLITICS OF PRUDENCE* 19-20 (1993) [hereinafter KIRK, *PRUDENCE*] (stating that “in politics we would do well to abide by precedent and even prejudice, for the great mysterious incorporation of the human race has acquired a prescriptive wisdom far greater than any [person’s] petty private rationality”).

109. See *id.* at 20 (stating that “Burke agrees with Plato that in the statesman, prudence is chief among virtues”).

110. See, e.g., FINNIS, *NATURAL LAW*, *supra* note 28, at 112 (stating that consequentialist reasoning “is irrational”). Incorporating prudential considerations into a natural law methodology also implicates David Hume’s well-known point that “ought” claims cannot be derived from “is” statements. See Zuckert, *supra* note 32, at 707 (stating that Hume’s point is that “is” statements and “ought” statements are

arises, however, attention to long-term consequences is essential. If nothing else, the law of unintended consequences must be given its due. The prudent legislator is hesitant to promulgate reforms that may give rise to new and unforeseen abuses that are worse than the evil to be cured.

Although prudence justifies reliance on empirical observations about the current state of the world, it also justifies consideration of the traditions of the community. The prudent legislator respects tradition precisely because the enduring truths of what Burke aptly called "original justice" are revealed slowly, with experience, over time.<sup>111</sup> As John Randolph put it, providence moves slowly, but the devil always hurries.<sup>112</sup> The individual is foolish, but the species is wise. We thus turn aside from ancient usage at our peril; it is far better to profit from the wisdom of our forebearers.<sup>113</sup>

Third and finally, a great virtue of tradition is that it gives us a vantage point different from today's prevailing judgment.<sup>114</sup> Individual reason in today's moral climate too often leads to mere values, which are purely matters of personal preference, lacking the moral force to bind others. In contrast, tradition emphasizes virtue, which is backed by the sanction of an enduring moral order with real teeth. The seven cardinal virtues—justice, fortitude, prudence, temperance, faith, hope and charity—thus are not questions of personal preferences. The individual can choose not to live up to those standards, but our moral heritage treats that choice as a sin having consequences.

The function of practical reason within a moral tradition thus is not a critical one, seeking to expose the tradition's faults, but rather a respectful one, seeking to learn what the tradition offers.<sup>115</sup> Edmund Burke, for example, approved of those who:

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different in kind and one by itself cannot lead to other). As we have seen, natural law is fundamentally a series of "ought" claims. According to some interpreters of Hume, empirical observations about the state of the world cannot lead to conclusions about the validity of a purported natural right or law. *See id.* (discussing interpretations of Hume). It is possible, however, to construct a natural law methodology that satisfies Hume's point that "ought" conclusions must derive from an "ought premise," and yet still have room for empirical claims as well. For a discussion of the implications of Hume's analysis for natural law, see *id.* at 706-08 (discussing Hume's effort to make people aware of function of "ought" premises in our moral judgment).

111. *See* Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393, 403 [hereinafter McConnell, *Establishment and Toleration*] (stating that Burke believed "original justice" reveals itself slowly, overtime).

112. *See* KIRK, PRUDENCE, *supra* note 108, at 20 (noting that John Randolph stated that "providence moves slowly, but the devil always hurries").

113. *See id.* at 251.

114. *See* McConnell, *Role of Democratic Politics*, *supra* note 85, at 1505.

115. *See id.* at 1507 (stating that practical reason approaches tradition with "respectful—even pious—attitude").

[I]nstead of exploding general prejudices, employ their sagacity to discover the latent wisdom that prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice [i.e., tradition or custom], with the reason involved, than to cast away the coat of prejudice and to leave nothing but the naked reason.<sup>116</sup>

This form of respect for tradition requires neither blind resistance to change nor a return to some idyllic past. Burke, the father of modern conservatism, was known in his own time as a reformer.<sup>117</sup> Burke's conservatism was expressed in his limitation of reform to clear and present social dangers and his resistance to reforms premised on abstract reason.<sup>118</sup> A Burkean theory of natural law thus admits the possibility of legal reforms based on natural rights as discerned by practical reasoning within the confines of our moral traditions, but rejects radical reforms purported to promote some radical or utopian academic scheme.

### III. PARTICIPATORY MANAGEMENT AND THE SELF

#### A. *Participation as a Means of Self-Fulfillment in Catholic Social Teaching*

Worker participation in corporate decisionmaking has been a major theme of Catholic social teaching for several decades.<sup>119</sup> In the Bishops' pastoral letter on economic justice, for example, the U.S. Bishops endorsed collective bargaining by unions, asserted that workers have a right to be informed about prospective plant closings or layoffs and to negotiate with management over alternatives, encouraged consideration of cooperative ownership structures and opined that directors' fiduciary obligations to shareholders should be tempered by economic justice to employees and other nonshareholder constituencies.<sup>120</sup> Of particular relevance to the problem at hand is the Bishops' endorsement of what they called "new forms of partnership between workers and managers" to promote "greater participation and accountability within firms."<sup>121</sup> Without suggesting any particular form of worker participation (such as codetermination), they

116. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE § 2(a) (1893).

117. See KIRK, PRUDENCE, *supra* note 108, at 50-51 (stating that without Burke's contributions, conservative-minded people would be impoverished because Burke foresaw revolutions of our time and expounded principles that conservatives have since endeavored to defend).

118. See PETER JAMES STANLIS, EDMUND BURKE AND THE NATURAL LAW 113 (1958) (noting that Burke was convinced that alterations in civil society should not be made by virtue of abstract speculative reason).

119. See generally BISHOPS' LETTER, *supra* note 39, ¶¶ 301-02, *reprinted in* THE CATHOLIC CHALLENGE, *supra* note 39, app. (discussing Catholic social teaching and worker participation).

120. See *id.* ¶¶ 301-05, *reprinted in* THE CATHOLIC CHALLENGE, *supra* note 39, app. (discussing approaches to increase worker participation).

121. *Id.* ¶ 299, *reprinted in* THE CATHOLIC CHALLENGE, *supra* note 39, app.

did generally endorse what they called "innovative methods for increasing worker participation within firms."<sup>122</sup>

The relevant papal encyclicals tend in the same direction. In his 1981 encyclical *Laborem Exercens*,<sup>123</sup> for example, Pope John Paul II asserted that a worker "wishes to be able to take part in the very work process as a sharer in responsibility and creativity at the work-bench to which he applies himself."<sup>124</sup> Although the Pope has said that the "church has no models to present,"<sup>125</sup> some commentators believe that Pope John Paul II in fact has tried to strike a compromise between socialism and capitalism through a form of corporatism in which state planning of the economy is balanced by democratic self-management within the enterprise.<sup>126</sup> *Laborem Exercens*, in particular, endorses an employer-employee partnership apparently to be achieved through co-ownership and codetermination.<sup>127</sup>

The claims made by Catholic social teaching in this area rest on a number of grounds. In this part, I examine the assertion that the right of employees to participate in corporate decisionmaking derives from their fundamental human need for personal development and self-fulfillment, a claim that goes back to at least Pope John XXIII.<sup>128</sup> Expanding on prior encyclicals positing workers to be partners in the productive process, Pope John contended that work is one of the means whereby we perfect and fulfill our human potential.<sup>129</sup> The personality and human nature of a worker denied the sense of personal initiative that comes from participation will be stunted.<sup>130</sup> Because a worker vested with decisionmaking and/or initiation rights is empowered to make free choices, his or her

122. *Id.* ¶ 301, reprinted in *THE CATHOLIC CHALLENGE*, *supra* note 39, app.

123. POPE JOHN PAUL II, *LABOREM EXERCENS* (1981) [hereinafter *LABOREM EXERCENS*], reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 351.

124. *Id.* ¶ 15, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 374.

125. *CENTESIMUS ANNUS*, *supra* note 2, ¶ 43, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 465.

126. See, e.g., John Gray & William Doino, Jr., *The Last Socialist?*, *NAT'L REV.*, June 30, 1989, at 27, 27 (stating that Pope's vision is "an alternative to both capitalism and socialism").

127. See *LABOREM EXERCENS*, *supra* note 123, ¶ 14.4, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 373-74 (noting "special significance" of proposals for worker ownership and participation).

128. For a discussion of the assertion that the right of employees to participate in corporate decisionmaking derives from their fundamental need for personal development and self-fulfillment, see *infra* notes 222-30 and accompanying text.

129. See Naughton, *Participation in the Organization*, *supra* note 42, at 926 (interpreting Pope John XXIII's assertions to stand for proposition that participation in workplace is instrumental to development of human personality).

130. See *id.* at 926-27 (stating that to deny workers freedom of action through participation prevents them from perfecting their personality).

personality develops in a more wholesome way than if he or she is treated as an automaton whose every action is subject to hierarchical control.<sup>131</sup>

Pope John XXIII's argument was framed within the broader context of the series of papal encyclicals touching on the economy, beginning with Pope Leo XIII's *Rerum Novarum*<sup>132</sup> and culminating with Pope John Paul II's *Laborem Exercens* and *Centesimus Annus*.<sup>133</sup> Work is seen in these encyclicals as a means by which humans collaborate in God's ongoing act of creation.<sup>134</sup> The Creator hid untold riches and possibilities within creation, which it is humanity's vocation to discover and develop through work.<sup>135</sup> Humanity's capacity for creativity is thus one of the ways in which people were made in God's image. This innate capacity, however, requires development. Accordingly, work is not only a process by which we collaborate in God's creative transformation of the world, but also a process by which we are transformed into a more fully human person.<sup>136</sup> This process of self-fulfillment is both a duty and a privilege.<sup>137</sup>

Participation rights, opine the encyclicals, promote creativity by providing a sphere of action within which workers may take personal initiative.<sup>138</sup> In contrast, workplaces organized "so as to ensure maximum returns and profits with no concern whether the worker, through his own labor, grows or diminishes as a person," deny these purported human needs and, moreover, result in worker alienation.<sup>139</sup> "The effects of non-

131. See *id.* at 927 (arguing that because work is formative, structure of workplace must accommodate self-determining nature of people by allowing workers their own management when possible).

132. POPE LEO XIII, *RERUM NOVARUM* (1891) [hereinafter *RERUM NOVARUM*], reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 15.

133. See generally *CENTESIMUS ANNUS*, *supra* note 2, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 351 (standing for proposition that work is means by which humans collaborate in God's ongoing act of creation); *LABOREM EXERCENS*, *supra* note 123, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 432 (same).

134. See *LABOREM EXERCENS*, *supra* note 123, ¶ 25, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 386 (stating that humans throughout ages have acted creatively in accordance with God's will). See generally Michael Novak, *Creation Theology*, [hereinafter Novak, *Creation Theology*] in *CO-CREATION AND CAPITALISM: JOHN PAUL II'S Laborem Exercens* 17 (John W. Houck & Oliver F. Williams eds., 1983) [hereinafter *CO-CREATION AND CAPITALISM*] (discussing creation theology).

135. See Novak, *Creation Theology*, *supra* note 134, at 28 (stating that it is vocation of people to discover their possibilities for "the common good of all").

136. See *CENTESIMUS ANNUS*, *supra* note 2, ¶¶ 32-33, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 456-57 (discussing virtues achieved through work).

137. See POPE PAUL VI, *POPULORUM PROGRESSIO* ¶ 15 (1967) [hereinafter *POPULORUM PROGRESSIO*], reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 221, 226 (stating that "every man is born to seek self-fulfillment" and that humans are "endowed with intellect and free will").

138. See Naughton, *Participation in the Organization*, *supra* note 42, at 929 (discussing encyclicals' views regarding creativity and participation).

139. *CENTESIMUS ANNUS*, *supra* note 2, ¶ 41.1, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 464.

participation—passivity, inertia, timidity, and intellectual stagnation—cheat people of the full development of their personhood.”<sup>140</sup>

I am skeptical of the papal argument for both empirical and theoretical reasons. If Pope John Paul II is correct, employee involvement should enhance employee morale. In turn, workers empowered by participation rights should be more productive than alienated workers denied such rights.<sup>141</sup> Neither seems to be the case. I have reviewed the relevant empirical literature in detail elsewhere.<sup>142</sup> Suffice it to say that there is no conclusive documentation that employee involvement consistently leads to long-term economic benefits. As another review of the empirical evidence concluded, “while participation *may* improve productivity, participation does not consistently have this effect and, in some cases, is actually less effective than non-participation.”<sup>143</sup>

The encyclicals’ line of argument is also undermined when we more rigorously examine the place of work in human nature and development. Pope John Paul II’s understanding of work is consistent with the claims of various psychologists that work satisfies a number of human needs.<sup>144</sup> As the story goes, humans need safety—security, structure and order.<sup>145</sup> Work provides a regular paycheck and a structured environment in which we spend much of our day.<sup>146</sup> Humans also need recognition—a sense

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140. Michael Naughton, *An Essay on Jonathan Boswell’s COMMUNITY AND THE ECONOMY: THE THEORY OF PUBLIC CO-OPERATION*, 51 REV. SOC. ECON. 86, 90 (1993) [hereinafter Naughton, *An Essay*]. Exercising our creative powers in the workplace not only helps us more accurately reflect the image of God in which we were created, but it also promotes virtue. See Naughton, *Participation in the Organization*, *supra* note 42, at 928-29 (discussing importance of creativity as image of divinity that ought to be expressed in workplace). Virtue is a willingness to act against interest, and thus “the means whereby man becomes good as man.” LABOREM EXERCENS, *supra* note 123, ¶ 9.3, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 365. Pope John Paul II contends that industriousness, diligence, honesty, prudence and the like are all virtues essential to success in a market economy that are learned in the workplace. See CENTESIMUS ANNUS, *supra* note 2, ¶ 32.2, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 456-57 (discussing important virtues for success in market economy).

141. Cf. George C. Lodge, *Managers and Managed: Problems of Ambivalence*, in CO-CREATION AND CAPITALISM, *supra* note 134, at 229, 232 (stating that fulfillment and efficiency improve with participation); Marshall Sashkin, *Participative Management is an Ethical Imperative*, 12 ORG. DYNAMICS 5, 11 (1984) [hereinafter Sashkin, *Participative Management*] (arguing that “participative management has positive effects on performance, productivity, and employee satisfaction”).

142. See Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (finding empirical evidence inconclusive at best in demonstrating that participatory management improves worker morale and productivity).

143. Edwin A. Locke et al., *Participation in Decisionmaking: When Should it be Used?*, 14 ORG. DYNAMICS 65, 69 (1986).

144. See, e.g., ABRAHAM MASLOW, *MOTIVATION AND PERSONALITY* 39-43 (2d ed. 1970) (discussing various human needs).

145. See *id.* (discussing safety needs).

146. See Thomas Earl Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U. CIN. L. REV. 1679, 1683 (1995) (stating that work satisfies needs for safety, pay and structure).

that they are respected by others.<sup>147</sup> Work (and the money it brings in) provides status and distinction that help meet this need.<sup>148</sup>

Surely Pope John Paul II overstated the case, however, when he opined that work is the “essential key” to the “whole social question.”<sup>149</sup> There is no scriptural basis for that claim.<sup>150</sup> To the contrary, insofar as the Pope’s arguments rely on humanity’s status as cocreator with God, those arguments are entirely nonscriptural. Humans may (and should) imitate God’s creative work, but people do not share in God’s work as Creator. In the Genesis account, creation was completed on the sixth day.<sup>151</sup> “That is exactly why God could call it good and rest” on the seventh day.<sup>152</sup> Instead of being part of an ongoing process of creation, work was a direct result of the Fall—when exiled from Eden, humans were condemned to “painful toil.”<sup>153</sup> Work was thus not intended to be intrinsically fulfilling, but simply a necessary means of survival.<sup>154</sup>

The papal vesting of work with such substantial spiritual significance errs in at least two further respects. First, it smacks of salvation through works. Indeed, a prior Pope (Paul VI) explicitly linked the duty to work out one’s own self-fulfillment to the duty to work out one’s own salvation: “In God’s plan, every person is born to seek self-fulfillment . . . . Endowed with intellect and free will, each man is responsible for his fulfillment even as he is for his salvation.”<sup>155</sup> I do not claim to understand the intricacies of modern Catholic doctrines on salvation; I only point out that the apparent linkages between work, self-fulfillment and salvation are troubling to those of us who come out of the Protestant tradition of salvation by grace. Second, the Pope’s privileging of work flirts with the error of idolatry. As I explain in the next section, an overemphasis on self-fulfillment risks deify-

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147. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 162-63 (1992) [hereinafter FUKUYAMA, *END OF HISTORY*] (discussing history of philosophical texts dealing with “recognition”); MASLOW, *supra* note 144, at 45-47 (stating that humans have desire for reputation and prestige).

148. See Geu & Davis, *supra* note 146, at 1683 (stating that “work may be one way to achieve recognition”).

149. LABOREM EXERCENS, *supra* note 123, ¶ 3, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 357.

150. See Stanley Hauerwas, *Work as Co-Creation: A Critique of a Remarkably Bad Idea*, in CO-CREATION AND CAPITALISM, *supra* note 134, at 42, 43 (stating that “John Paul II is only using scripture to buttress a theory arrived at on other grounds”).

151. See *Genesis* 2:1-2 (stating that God rested on seventh day).

152. Hauerwas, *supra* note 150, at 45.

153. See *Genesis* 3:17. It would be more precise to say that unfulfilling and even painful work was the result of the Fall. See Hauerwas, *supra* note 150, at 48 (discussing scripture’s treatment of work). Before the Fall, Adam was to till and keep the Garden. See *Genesis* 2:15. As a result of the Fall, however, work was transformed into the painful toil detailed in *Genesis* 3:17.

154. See Hauerwas, *supra* note 150, at 48 (stating that “[w]ork gives us the means to survive”).

155. POPULORUM PROGRESSIO, *supra* note 137, ¶ 15, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 226.

ing the self, although Catholic social teaching purports to avoid this error by remaining ultimately fixed on the Deity.<sup>156</sup>

Even if we concede, *arguendo*, that work is central to one's self-definition, we need not concede the conceptually distinct claim that workers have a moral right to participate in corporate decisionmaking. The centrality of work to the human experience is more directly relevant to the question of whether there is a right to work than to the one at bar. A right to participate in workplace decisions requires further justification. As we have seen, the Pope advances self-fulfillment as one such justification.

In my judgment, however, Catholic social teaching in this area rests on untenable assumptions about both work and human nature. As to work, recall Pope John Paul II's claim that participation rights promote creativity. Assuming *arguendo* that management of the enterprise is a creative activity, only those who "take the initiatives, who make the proposals, or who mobilize opposition to them, [and] who do the talking in whatever bodies take the major decisions" truly can be said to be acting creatively:

Even where these [firm] decisions are taken by the workers . . . collectively, most of them (if the organization is large) are mere listeners and voters. Their role is not unimportant, but it also is not exactly 'creative', as the role of a leader may be said to be. And if the workers elect representatives to make the major decisions for them, their role as mere electors, though still important, is even less creative. All or most of the workers in an organization can take a creative part in managing it, only if two conditions hold: if the organization is small and they all take part in making the major decisions.<sup>157</sup>

As to the assumptions made by Catholic social teaching with regard to human nature, Pope John XXIII asserted that as workers become more educated they desire "to assume greater responsibility in their own sphere of employment."<sup>158</sup> Pope John Paul II likewise assumed that the individual worker wishes "to take part in the very work process as a sharer in responsibility and creativity."<sup>159</sup> He therefore condemned the "system of excessive bureaucratic centralization, which makes the worker feel that he is just a cog in a huge machine moved from above."<sup>160</sup> Much of the secular humanist literature on participatory management likewise treats employees as having a uniform preference for participation:

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156. For a discussion of the potential consequences of an overemphasis on self-fulfillment, see *infra* notes 162-90 and accompanying text.

157. John Plamenatz, *Why Should the Workplace be Democratic*, in *MORAL RIGHTS IN THE WORKPLACE* 293, 297 (Gertrude Ezorsky ed., 1987).

158. POPE JOHN XXIII, *MATER ET MAGISTRA* ¶ 96 (1961) [hereinafter *MATER ET MAGISTRA*], reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 98.

159. *LABOREM EXERCENS*, *supra* note 123, ¶ 15, reprinted in *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 374.

160. *Id.*



The opportunity to speak and be heard is a vital factor of employees' self-esteem and sense of contribution to the firm. . . . [W]ork organizations in which widespread participation is the norm may also contribute to the performance goals of the firm by making better decisions, because many points of view are considered in the decisionmaking process.<sup>161</sup>

In other words, employees represent many different points of view, but all have a taste for participating in corporate decisionmaking.

I believe that these empirical claims are, at best, over-stated. Some workers demonstrably prefer hierarchical workplaces where decisionmaking is reserved to management over workplace democracy.<sup>162</sup> Consider the empirical data on union involvement, which suggests that apathy is common.<sup>163</sup> Only a very low percentage of a union's members actively participate in its affairs.<sup>164</sup> In his important case study of an early self-directed work team, John Witte contended from such evidence that "there is little reason to suspect that most workers would either endorse the idea of participation or become actively involved if the opportunity arose."<sup>165</sup> To the contrary, Witte posits that workers generally accept hierarchical authority and perceive obedience to authority as an integral part of their job because "for the majority, disobedience is unthinkable."<sup>166</sup>

Although there is more recent evidence that some American workers desire a greater voice with respect to shop floor issues, such as work content and schedules, there is still both empirical and anecdotal support for

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161. Karen L. Newman, *The Just Organization: Creating and Maintaining Justice in Work Environments*, 50 WASH. & LEE L. REV. 1489, 1498 (1993) (footnotes omitted); accord Lodge, *supra* note 141, at 232 (stating that "implicit in all [companies] is the idea that relationships between those who manage and those who are managed are best determined by consensus rather than by conflict around a contract").

162. See Joseph E. Stiglitz, *Incentives, Risk, and Information: Notes Toward a Theory of Hierarchy*, 6 BELL J. ECON. 552, 571-72 (1975) (stating that some employees prefer coercive hierarchies); see also JOHN F. WITTE, DEMOCRACY, AUTHORITY, AND ALIENATION IN WORK: WORKERS' PARTICIPATION IN AN AMERICAN CORPORATION 40-41 (1980) (stating that some workers prefer to leave decisionmaking to people in authority). See generally David J. Glew et al., *Participation in Organizations: A Preview of the Issues and Proposed Framework for Future Analysis*, 21 J. MGMT. 395, 404-05 (1995) (summarizing studies of personality differences and similar factors affecting outcome of participatory management).

163. See, e.g., WITTE, *supra* note 162, at 25 (providing empirical data on union involvement).

164. See *id.* (noting that union participation is generally low). But see PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 30 (1990) (stating that union participation is active).

165. WITTE, *supra* note 162, at 25.

166. *Id.* at 38; accord Alan Hyde, *In Defense of Employee Ownership*, 67 CHI.-KENT L. REV. 159, 202 (1991) (arguing that employees are "conditioned to accept managers").

Witte's pessimistic prediction.<sup>167</sup> A recent study of transportation firms found that long-term use of employee involvement initiatives increased stress and decreased employee fulfillment—exactly contrary to the encyclicals' expectations.<sup>168</sup> A study of "empowered" employees versus a control group of "unempowered" employees within a single insurance company found no statistical difference between the two groups on such productivity-related issues as motivation, or even on some job satisfaction measurements.<sup>169</sup> Only about half of the participants in Witte's own case study were willing to change jobs to get more participation, and that rate declined rapidly if doing so would require longer hours or lower pay.<sup>170</sup> In unionized plants, rank and file workers have often resisted collective bar-

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167. See WITTE, *supra* note 162, at 25-31 (finding that workers' interest in participation generally lies in matters concerning their own work). Witte's data show the lowest worker interest with respect to strategic decisions and personnel matters. See *id.* (presenting statistics regarding how much influence workers think they should have). The more recent and more comprehensive Families and Work Institute survey found equivocal results. See ELLEN GALINSKY ET AL., THE FAMILIES AND WORK INSTITUTE'S NATIONAL STUDY OF THE CHANGING WORKFORCE: HIGHLIGHTS 15 (1993) (noting that most workers are not unequivocally devoted to serving their companies and organizations because of uncertain terms of employment in today's economy). On the one hand, 55% of workers who had changed jobs within the preceding five years listed control over work content as a "very important" factor in deciding to take their current job. See *id.* On the other hand, only 6% of all workers listed control over work content and schedule as a measure of personal success. See *id.* at 13. In both cases, multiple responses were allowed. Other polling results vary, although most show that more than half of workers desire participation in decisionmaking. See Tom Juravich, *Empirical Research on Employee Involvement: A Critical Review for Labor*, 21 LAB. STUD. J. 51, 58 (1996) (finding that 62% of workers wanted to influence training decisions, while 52% wanted influence over implementing new work); see also Commission on the Future of Worker-Management Relations, *Employee Participation and Labor-Management Cooperation in American Workplaces*, CHALLENGE, Sept.-Oct. 1995, at 38, 39 (stating that more than 80% want to participate in decisionmaking). Note, however, that none of this data support the proposition that one size fits all.

168. See Ronald D. Anderson et al., *Relationships of Work Improvement Program Experience and Logistics Quality Management Factors*, 36 TRANSP. J. 20, 30-31 (1996) (noting possible confounding factors). For a recent anecdotal account supporting this conclusion, see Ralph T. King, Jr., *Jeans Therapy: Levi's Factory Workers are Assigned to Teams, and Morale Takes a Hit*, WALL ST. J., May 20, 1998, at A1 (supporting conclusion that long-term use of employee involvement initiatives increased stress and decreased employee fulfillment).

169. See Alan J.H. Thorlakson & Robert P. Murray, *An Empirical Study of Empowerment in the Workplace*, 21 GROUP & ORG. MGMT. 67, 79-80 (1996) (stating that although results of study indicated that there was no significant difference between empowered and nonempowered groups, hypothesis could not be ruled out because of lack of supplemental follow-up and extenuating factors, such as downsizing).

170. See WITTE, *supra* note 162, at 34 (showing number of workers willing to change jobs in exchange for participation). In fact, there is good evidence that many workers prefer pay to participation or, at least, are more effectively motivated by pay than by involvement in decisionmaking. See Bainbridge, *Participatory Management*, *supra* note 5, at 702-03 (discussing Witte's finding that workers are unwilling to trade pay reductions for greater participation in decisionmaking).

gaining agreements that included employee involvement.<sup>171</sup> In firms adopting self-directed work teams, ten to twenty percent of employees will resist the change because they prefer a mundane job to the greater responsibility and higher expectations associated with team membership.<sup>172</sup> Other studies have found even higher rates of resistance—participation rates in voluntary participatory management programs range from a low of thirty-three percent to a high of sixty-eight percent of the eligible workforce.<sup>173</sup> Conversely, a study of nonparticipating employees found that interest in volunteering for employee involvement programs ranged from a low of fifteen percent to a high of sixty-three percent.<sup>174</sup> Anecdotal evidence suggests that firms using participatory management techniques are expending considerable effort in selecting employees who are psychologically equipped to work under those conditions, which is precisely what one would expect if some workers are not temperamentally suited for participatory workplaces.<sup>175</sup> The existence of differing tastes among workers is also suggested by evidence that workforce demographics are correlated with the effectiveness of participatory management.<sup>176</sup>

Why do some workers prefer hierarchy? Some are simply being economically rational. Behavioral patterns, learned over many years and reinforced by past rewards, are exceedingly resistant to change.<sup>177</sup> As such, many firms will experience a path dependent resistance to participatory

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171. See Mike Parker, *Industrial Relations Myth and Shop-Floor Reality: The Team Concept in the Auto Industry*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 249, 259 (Nelson Lichtenstein & Howell John Harris eds., 1993) [hereinafter *INDUSTRIAL DEMOCRACY IN AMERICA*].

172. See COTTON, *supra* note 14, at 196 (stating that some workers prefer their present work over work with increased responsibilities and higher expectations).

173. See Robert W. Miller & Frederick N. Prichard, *Factors Associated with Workers' Inclination to Participate in an Employee Involvement Program*, 17 *GROUP & ORG. MGMT.* 414, 415 (1992) (citing study of participation rates in voluntary participatory management programs).

174. See *id.* (stating that among nonparticipating employees, interest in volunteering for employee involvement programs is lower).

175. See Edward E. Lawler, *The New Plant Revolution Revisited*, 19 *ORG. DYNAMICS* 4, 5-6 (1990) (stating that firms involved in participatory management spend more time selecting employees).

176. See Robert Drago, *Share Schemes, Participatory Management and Work Norms*, 23 *REV. RADICAL POL. ECON.* 55, 59 (1991) (discussing study of participation schemes in Australia that found that such programs are more effective when work force is homogeneous); see also Glew et al., *supra* note 162, at 405-06 (stating that women and minorities tend to view themselves as not participating in decisionmaking). Management demographics also appear relevant, in light of findings that female managers tend to provide more frequent opportunities for employee involvement than male managers. See *id.* at 406 (stating that female managers provided opportunities for participation more frequently than male managers, resulting in increased offers of participation from employers); see also Judy B. Rosener, *Ways Women Lead*, *HARV. BUS. REV.*, Nov.-Dec. 1990, at 119, 120 (stating that women "encourage participation").

177. See Jeffrey Candz & Frederick G. Bird, *The Ethics of Empowerment*, 15 *J. BUS. ETHICS* 383, 387 (1996) (explaining that worker preference for hierarchy may be learned through past behavior patterns).

management. Introduction of participatory management within a firm typically entails substantial change, which will threaten vested interests in the workforce. Self-directed work teams threaten the seniority—and even the jobs—of forepersons and other supervisory employees. Surviving supervisors are thrust into new positions as “team consultants,” rather than bosses, with new and demanding responsibilities. Gain-sharing, pay for skills and team-based compensation all threaten traditional seniority-based compensation. Training may be resisted by some workers—the “old dogs” who don’t want to learn new tricks. The job rotation and stress on “continuous improvement,” characteristic of self-directed work teams, will threaten those workers who prefer a more mundane set of job responsibilities.<sup>178</sup>

Studies of formalization—the creation of written rules, procedures and instructions—provide an alternative explanation of the taste for hierarchy.<sup>179</sup> Formalization reduces role conflicts and ambiguity, which increases work satisfaction and reduces feelings of alienation and stress.<sup>180</sup> In contrast, employee involvement can trigger role stress because many employees lack the quasi-management skills—agenda building, conflict management and problem-solving—required for successful employee involvement.<sup>181</sup> Alienation can result from the greater workload and negative changes in peer group relationships experienced by some participants in employee involvement.<sup>182</sup>

Workers who respond well to formalization are poor candidates for participatory management, and vice-versa. This hypothesis is supported by findings that the success of a participatory management program largely depends on the personality of workers and managers.<sup>183</sup> Workers with weak desires for independence are unaffected by employee involvement,

178. See Parker, *supra* note 171, at 266 (“Kaizen[ing] [a component of NUMMI’s employee involvement program referring to continuous job improvement] is supposed to be creative, but I mean how many times can you sit there and Kaizen a job after you’ve done it for four and one-half years?”). NUMMI is the well-known GM-Toyota joint venture. See *id.*

179. See Paul S. Adler & Bryan Borys, *Two Types of Bureaucracy: Enabling and Coercive*, 41 ADMIN. SCI. Q. 61, 61 (1996) (discussing studies that have found that formalization results in coercive organization because it entails abrogation of individual autonomy).

180. See *id.* at 62 (stating that formalization may reduce worker stress and alienation).

181. See *Why Doesn’t This Team Work?*, HARV. BUS. REV., Nov.-Dec. 1994, at 26, 30 (explaining that “[t]hese are people who just don’t have the skills needed to work constructively in teams—and who are unable or unwilling to acquire those skills”). Several empirical studies have confirmed that training in these skills is an essential component in successful employee involvement. See Ray W. Coye & James A. Belohalv, *An Exploratory Analysis of Employee Participation*, 20 GROUP & ORG. MGMT. 4, 4 (1995) (summarizing empirical studies).

182. See Glew et al., *supra* note 162, at 407-08 (explaining that some participants in employee involvement programs experience alienation).

183. See COTTON, *supra* note 14, at 18 (comparing personalities of workers and managers with regard to participatory management programs).

while those with strong independence drives get increased job satisfaction from it.<sup>184</sup> Based on the various studies recounted above, both types of workers appear to be present in the American workplace. Whether the taste for participation or for hierarchy is more common is hard to say from the evidence to date, but at the very least the "checkered history of job enrichment efforts has taught us not to assume that everyone wants more autonomy, challenge, and responsibility at work."<sup>185</sup>

Proponents of the papal position might dismiss such workers as being unable to recognize their own needs.<sup>186</sup> Such an argument appears to be implicit in Pope John Paul II's assertion that someone "is alienated if he refuses to transcend himself and to live the experience of self-giving and of the formation of an authentic human community oriented toward his final destiny, which is God."<sup>187</sup> This papal dictum smacks of the Aristotelian error of monistic perfectionism, which is the view that there is one supremely valuable way of life.<sup>188</sup> Indeed, the Pope appears to make the same error for which he condemned socialism; namely, the belief "that the good of the individual can be realized without reference to his free choice."<sup>189</sup>

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184. See *id.* (summarizing results of research); see also Glew et al., *supra* note 162, at 405 (summarizing studies finding that individuals with strong need for independence and low need for authority showed most productivity gains from participatory management, while workers who need authority favor structured hierarchy).

185. David E. Bowen & Edward E. Lawler, *The Empowerment of Service Workers*, SLOAN MGMT. REV., Spring 1992, at 31, 39.

186. I note *en passant* that the heterogeneity of worker tastes is a principal reason I have opted against evaluating arguments based on a Rawlsian conception of justice. Trying to figure out what people would do behind the veil is necessarily indeterminate once we concede the existence of differing tastes. A Rawlsian might object that individuals behind the veil of ignorance are unencumbered by these sorts of values and preferences. To imagine such an unencumbered self is, however, "not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth." MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179 (1982). Real people are capable of self-knowledge, which the Rawlsian unencumbered self is incapable of in any morally significant sense. See *id.* at 180 (comparing own character and ability of self-knowledge to deontological self, which is without character and incapable of self-knowledge).

187. CENTESIMUS ANNUS, *supra* note 2, ¶ 41.2, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 464.

188. See Bradley, *Pluralistic Perfectionism*, *supra* note 71, at 677 (stating that Aristotle's cardinal error was his monistic perfectionism, or that "there is one supremely valuable form of life that is the standard for everyone"). Bradley also stated that "Aristotle mistakenly thought that a person's apparent failure, for whatever reason, to live up to the contemplative ideal was an imperfection which meant that that person was justly treated by public authority as an inferior." *Id.*

189. CENTESIMUS ANNUS, *supra* note 2, ¶ 13, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 442. As one commentator observed of the comparable claims made by the secular humanists:

Workers seem not always to share the aspirations for their class of the radicals. Often, they seem to care less about managing the businesses they work in than about being well organized to get good wages and conditions of work, and other concessions, from their employers and the gov-

To be sure, my argument is only that worker tastes are heterogeneous. Some workers do want to participate in corporate decisionmaking. Presumably, at least, some such workers also develop feelings of alienation when they are denied participation rights. Should not their needs and desires be factored into the public policy equation? But how do we decide which set of preferences to privilege? Implicit in much of the papal and secular literature in this area is the notion that the desire for participation is somehow more authentic and, hence, more worthy of protection. In this regard, much of the literature smacks of a variant of hard determinism, asserting that choices made in accordance with a system of belief or socially constructed values are inauthentic.<sup>190</sup> Even if one accepts the determinist view, however, why is the choice to participate any more authentic than the choice to refrain from participation? If one is socially constructed and, hence, not authentic, is not the other equally socially constructed?

I find it useful to recast the problem of choosing between competing sets of preferences in economic terms. First, recall that prudence dictates attention to long-term consequences before codifying purported natural rights, which requires making predictions about the effect of new regulations on human behavior. Making such predictions is one of the great strengths of economic analysis.<sup>191</sup> Second, the economic concepts of Pareto superiority and Kaldor-Hicks efficiency, along with the distinctions between them, nicely capture the point I am trying to make in this section.<sup>192</sup>

To satisfy the Pareto superiority definition of efficiency, a transaction must make at least one person better off and no one worse off.<sup>193</sup> Kaldor-Hicks efficiency does not require that no one be made worse off by a reallocation of resources.<sup>194</sup> Instead, it requires only that the resulting in-

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ernment. Radicals sometimes put this down to their being affected by 'bourgeois' ideas or diverted from ambitions they would otherwise have by bourgeois tastes and comforts. But many of the ideas and tastes that critics of bourgeois society call bourgeois are no more bourgeois than proletarian.

Plamenatz, *supra* note 157, at 298.

190. For a general discussion of hard determinism, see Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1137 (1997).

191. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law*, 82 CORNELL L. REV. 856, 873, 886 (1997) [hereinafter Bainbridge, *Community and Statism*] (stating that economic analysis makes reliable predictions about human behavior).

192. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13-14 (4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*] (discussing economic concepts of Pareto superiority and Kaldor-Hicks efficiency).

193. See *id.* at 13 (stating that "[a] Pareto-superior transaction is one that makes at least one person better off and no one worse off").

194. See *id.* at 13-14 (discussing requirements of Kaldor-Hicks efficiency).

crease in wealth be sufficient to compensate the losers.<sup>195</sup> Note that although there does not need to be any actual compensation, compensation must be possible.<sup>196</sup>

Once the heterogeneity of worker tastes is conceded, government-mandated participatory management cannot be defended on Pareto superiority grounds. Those workers who have a taste for hierarchy would be worse off under such a mandate. The case for government mandates thus must be phrased in Kaldor-Hicks terms. For example, enough workers with a taste for participation must benefit from compulsory employee involvement to justify imposing it on all. If so, mandatory participatory management would be Kaldor-Hicks efficient, so long as the harm to workers that lose would be offset by the gains made by winners.

The validity of Kaldor-Hicks efficiency as a guide to public policy is sharply disputed.<sup>197</sup> In particular, important strains of natural law theory are clearly inconsistent with Kaldor-Hicks efficiency. The Lockean strain, for example, precludes the use of others as means to our own ends.<sup>198</sup> The modern strain associated with Catholic thinkers such as Finnis and German Grisez likewise proscribes doing evil that good may result.<sup>199</sup> Because the Kaldor-Hicks standard permits uncompensated wealth transfers, it runs afoul of these precepts.

The debate over Kaldor-Hicks efficiency, however, need not detain us further because government-mandated participatory management cannot be justified even under that lenient standard. I demonstrated this point in detail elsewhere.<sup>200</sup> In this Article, I want to emphasize three points directly relevant to the argument made by the papal encyclicals.

First, even conceding *arguendo* the Pope's arguments premised on worker alienation, how far should the argument be pressed? The point is essentially a prudential one. Many things in life impede self-fulfillment, interfere with one's sense of personhood and give rise to feelings of alienation. Are they all to be regulated as well? Prudence, reinforced by the law of unintended consequences, argues against such a course.

195. *See id.* (discussing compensation component under Kaldor-Hicks efficiency).

196. *See id.* (explaining that compensation must be possible under Kaldor-Hicks efficiency).

197. *See* RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 91-94 (1981) [hereinafter POSNER, *ECONOMICS OF JUSTICE*] (criticizing Kaldor-Hicks criterion because "it does not ensure that utility will be maximized"); Bruce Chapman, *Trust, Economic Rationality, and the Corporate Fiduciary Obligation*, 43 U. TORONTO L.J. 547, 554-55 (1993) (discussing Kaldor-Hicks in terms of public policy).

198. *See* J. BUDZISZEWSKI, *WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW* 106 (1997) [hereinafter BUDZISZEWSKI, *WRITTEN ON THE HEART*] (explaining that Lockean idea states "that we are not to use others as a means to our ends").

199. *See id.* at 198 (stating that doing some evil may produce good result).

200. *See* Bainbridge, *Participatory Management*, *supra* note 5, at 709-18 (evaluating leading arguments favoring mandatory employee involvement and concluding that mandatory employee involvement is not Kaldor-Hicks efficient).

Second, government mandates can themselves interfere with the individual's search for self-fulfillment. Hegel believed that freedom of contract had value precisely because it permits each of the parties to the contract to be recognized as formal equals, capable of exercising his or her individual will.<sup>201</sup> In the employment contract context, the employee achieves such recognition when he or she voluntarily enters into an agreement with the prospective employer. In contrast, government mandates deny the employee that recognition precisely because the employer is compelled to offer the mandated benefits.<sup>202</sup> I develop this argument in more detail below, demonstrating that the moral norms of our democratic polity are inconsistent with government-mandated employee involvement.

Third and finally, it is far from clear that participating in corporate decisionmaking is a useful way of addressing feelings of alienation. Just as participatory management is unlikely to employ the creativity of most workers in large enterprises, it seems equally unlikely to make their jobs less dull. Moreover, there are many other sources of alienation in most work environments over and above the decisionmaking process. Indeed, some jobs are inherently boring and alienating, even under otherwise ideal working conditions.

Participatory workplaces, therefore, can be just as alienating as hierarchical workplaces.<sup>203</sup> As we have seen, this is especially true of workers who prefer hierarchy, but it may be true of all workers. In today's corporate world, as I have demonstrated elsewhere, participatory management is used, not to prevent worker alienation, but mainly as a way of tapping workers for information and to prevent shirking.<sup>204</sup> Proponents of the papal position might dismiss this argument (among others) by conceding that present forms of employee involvement are, in their view, flawed, but that some ideal form exists that would be more effective in promoting human development. Such an argument, however, smacks of the "if only people were different" fallacy.<sup>205</sup> Sound public policy must be based on

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201. See Jonathan R. Macey, *Firm-Specific Human Capital Investments and Hegelian Ethics: A Comment on Cornell and Posner*, 11 CARDOZO L. REV. 505, 512 (1990) [hereinafter Macey, *Firm-Specific*] (explaining that freedom of contract represents autonomy and free will).

202. See *id.* at 512-13 (noting that government regulatory measures may deny employees free will recognized in freedom of contract).

203. For an anecdotal account of one workplace in which quality circles appear to be quite alienating, see GUILLERMO J. GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY* 23-31 (1988) (describing workers' dissatisfaction with employer's policy to implement quality circles). Most strikingly, this example is taken from a subsidiary of a corporation ranked first in a survey of community and environmental responsibility. See *id.* at 32.

204. See Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (finding that managers institute participatory management to further informational and monitoring interests, not for workers' benefit).

205. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 6 (1969) [hereinafter Demsetz, *Information and Efficiency*] (discussing nature of human behavior).



how people actually behave, not how we hope they would behave in an ideal world.

In sum, arguments premised on worker self-fulfillment cannot justify government-mandated participatory management. Mandates can only be justified (to continue using economic terminology) if they are demonstrably Pareto superior or, at least, Kaldor-Hicks efficient. In contrast, a free market approach to employee involvement can be justified without having to reach a firm conclusion on the efficiency issue. In other words, we do not need to conclude either that all firms and workers need highly authoritarian and rigidly hierarchical structures or that all need participatory democracy. Instead, if some firms and some workers prefer hierarchy, and some prefer participation, a free market approach permits them to choose the proper working environment for themselves.

To be clear, I am not arguing that a free market approach is perfect. For example, in the absence of regulation, some firms may exploit their workers.<sup>206</sup> If the perfect should not be allowed to become the enemy of the good, however, the question is not whether contracting in a free labor market is a perfect system, but simply whether it is superior to possible alternatives, specifically, government mandates imposed by legislative or regulatory fiat. Although proponents of mandates are quick to assert the market's flaws, they rarely acknowledge the equally glaring flaws of the legislative process. I contend, therefore, that a free market approach is superior to mandatory rules in enough respects to justify incurring the risk of occasional outcomes that are inefficient or appear to be unfair.

The capital, product and labor markets give corporate directors strong incentives to seek rules that enable them to attract capital and labor at the lowest possible cost.<sup>207</sup> Voluntary employee involvement will thus be designed to meet specific firm needs relating to monitoring and information transmission. In contrast, the incentives of legislators and regulators are driven by rent-seeking and interest group politics, which have no necessary correlation to corporate profit maximization.<sup>208</sup> Accordingly,

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206. As I explain below in more detail, however, this concern is frequently overstated in the promandate literature. For a further discussion, see *infra* notes 475-509 and accompanying text.

207. See Jonathan R. Macey, *Corporate Law and Corporate Governance: A Contractual Perspective*, 18 J. CORP. L. 185, 206 (1993) [hereinafter Macey, *Corporate Law*] (noting that driving market forces for corporate directors are competition in capital market, competition in internal and external labor markets and competition in products markets).

208. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991) (stating that proposition that legislators and regulators are driven by rent-seeking and interest-group politics is extreme form of basic tenet of public choice theory because it ignores possibility that legislators sometimes pursue public interest and/or ideological goals). In general, I concur with Jonathan Macey that "there is no reason to believe that politicians and bureaucrats are any more benign, selfless, and impartial than the corporate managers, directors, and controlling shareholders whose authority would be dis-

mandatory employee involvement is likely to be driven by the political concerns of the governmental actors drafting the mandates.

The evidence from other countries strongly justifies this prediction.<sup>209</sup> As I explain below in more detail, government-mandated forms of employee representation take shape in response to political forces, not economic ones. Such programs are intended not to produce improved employee attitudes or greater productivity, but to redistribute power within firms from managers and shareholders to labor.<sup>210</sup> In like manner, mandatory employee involvement in this country doubtless would be infected by interest group politics.

One possible scenario is that government intervention would be designed to protect union interests.<sup>211</sup> Given the apparent decline in the

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placed in a legal regime governed by mandatory rules." Macey, *Corporate Law*, *supra* note 207, at 205.

209. See Bainbridge, *Participatory Management*, *supra* note 5, at 879-81 (describing weaknesses of Japanese and German mandatory employee participation programs).

210. See COTTON, *supra* note 14, at 114-15 (stating that redistribution of power will put labor on more equal footing with interests of management and stockholders).

211. Cf. Parker, *supra* note 171, at 252-53 (noting that automobile unions tried to use political process to win influence over not just health and safety policy, but also corporate pricing and investment decisions). Greater employee control over the decisionmaking process leads to wealth transfers from shareholders to employees. See *id.* Adoption of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 (1994), in 1947, for example, reduced shareholder wealth by about 15.9%. See Craig A. Olson & Brian E. Becker, *The Effects of the NLRA on Stockholder Wealth in the 1930s*, 44 INDUS. & LAB. REL. REV. 116, 123 (1990) (analyzing drop in stockholder wealth between Senate's introduction of NLRA and adoption of NLRA). This is not surprising, given that rent-seeking on behalf of their members is one function of unions. Cf. POSNER, *ECONOMIC ANALYSIS*, *supra* note 192, at 321 (noting that classical economic theory treats unions as labor monopoly). Faithful union leaders should use the political process to maximize the wealth of their constituents. This conclusion arguably would render union opposition to employee involvement somewhat surprising if these plans actually shift power to workers, which supports the hypothesis that such programs are not intended to empower workers, but rather to provide new mechanisms for monitoring their productivity and tapping their knowledge. Many union-oriented observers see participatory management as simply a sophisticated anti-union device; at the very least, it seems fair to say that such programs erode union support and power. See MASAHIKO AOKI, *THE CO-OPERATIVE GAME THEORY OF THE FIRM* 131 (1984) (finding that union activists view participatory programs as potentially anti-union); GRENIER, *supra* note 203, at 20-21 (stating that "union leaders have expressed concern that the boom in work innovations, participation programs for employees . . . represents a new wave of management initiated anti-union control mechanisms"); Robert B. Moberly, *Worker Participation After Electromation and Du Pont*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 147, 157 (Sheldon Friedman et al. eds., 1994) (examining how committees may actually diminish union bargaining power and effectiveness); Virk, *supra* note 3, at 746 (viewing unions as incompatible with participatory management model). Such concerns are buttressed by evidence that cases in which the National Labor Relations Board (NLRB) invalidated employee involvement programs under NLRA section 8(a)(2) almost uniformly involve employer use of various anti-union tactics. See James R. Rundle, *The Debate Over the*

power of organized private-sector labor unions as special interest groups, however, this scenario is perhaps unlikely.<sup>212</sup> A more plausible scenario may be that mandatory employee involvement programs would be drafted in a way that benefits politically powerful large businesses, but may not benefit smaller firms, especially if big business and organized labor join forces.<sup>213</sup> In any case, the main point is that a proposal to mandate participation would quickly become little more than a political football between competing interest groups, with very little reason to believe that the outcome will be either morally or economically optimal.

Let us assume, however, that one could find a legislative or regulatory body that was willing to act solely in the public interest with respect to employee involvement. Let us further assume employee involvement is in the public interest. A legislative solution would still be less desirable than allowing the market to function, even under such assumptions. Legislators and regulators necessarily have less information about the needs of a particular firm than do that firm's employees, managers and directors. A *fortiori*, legislatures will make poorer decisions than the firm's constituents.<sup>214</sup> Put another way, legislators and regulators are no less subject to bounded rationality than any other decisionmakers. Just as the limits on cognitive competence impede the ability of market actors to write complete contracts, bounded rationality necessarily impedes the development of detailed legislative solutions.<sup>215</sup> The legislative task is further compli-

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*Ban on Employer-Dominated Labor Organizations: What is the Evidence*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra*, at 161, 166-73 (stating that NLRB rarely ordered disestablishment under NLRA section 8(a)(2) if it found no other unfair labor practices). A more nuanced account is provided by Weiler, who notes that participatory management may shift the locus of union power from the national level to the local level, and from officers to members, which would account for the opposition by union leaders. See WEILER, *supra* note 164, at 37.

212. Cf. GRENIER, *supra* note 203, at 178-79 (noting deteriorating political power of organized labor with respect to labor law revisions); RAYMOND L. HOGLER & GUILLERMO J. GRENIER, EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE 91-92 (1992) (same).

213. See Kevin G. Salwen, *To Some Small Firms, Idea of Cooperating With Labor is Foreign*, WALL ST. J., July 27, 1993, at A1 (stating that many small businesses actively resist employee unionization, seeing it as something more appropriate for large corporations).

214. Cf. Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 996 (1993) (noting that legislatures will make poorer decisions than corporation's constituents with respect to corporate governance rules). The problem is not just lack of information about particular firms, but also lack of information about the market as a whole. See Pete Hoekstra, *Mandated Cooperation: A '90s Oxymoron*, WALL ST. J., June 7, 1993, at A14 (arguing against Ford-Kennedy Bill, which mandates employee involvement programs). Congressman Pete Hoekstra opined: "Today's congressional proposals are 15 to 20 years behind the cutting edge of today's marketplace. Do we want government to promote already-outdated ideas, or rather to give companies the flexibility to experiment and determine what works best for their unique circumstances?" *Id.*

215. See Hoekstra, *supra* note 214, at A14 (stating that lack of flexibility and thoughtfulness in legislative solutions will lead to destruction of cooperative employer-employee relations).

cated because any mandatory policy promulgated in this area would encompass countless firms in numerous industries. As a result, legislative action is likely to take on a one-size-fits-all approach, which in turn is unlikely to fit anyone.

In sum, regulatory initiatives that go beyond privately negotiated agreements likely will leave all parties worse off.<sup>216</sup> Investor and worker preferences vary, but mandatory rules prohibit them from customizing their firm's operating rules to meet those individual preferences. In the face of such rules, firms for whom employee involvement is inefficient will have higher labor costs, which may lead them to move offshore or to temporary workers.<sup>217</sup> In contrast, enabling rules allow firms to develop innovative modifications to their rules in response to changing conditions.<sup>218</sup>

### B. *Participation as a Means of Self-Actualization in Secular Humanist Literature*

In its emphasis on self-fulfillment, Catholic social teaching somewhat resembles secular humanist literature because both flirt with the error of idolatry by over-emphasizing the self.<sup>219</sup> Catholic social teaching, however, is redeemed by its concomitant emphasis on the faith relationship with God.<sup>220</sup> In contrast with Catholic thought, secular humanist literature emphasizes a psychological concept of self-actualization that goes beyond merely flirting with error to become wholly inconsistent with the conception of human nature inherent in Western natural law.<sup>221</sup>

In a widely cited article, organizational psychologist Marshall Sashkin claimed that participation is a basic human need.<sup>222</sup> As his argument goes, human needs include autonomy, interpersonal contact and mean-

216. See Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 200-01 [hereinafter Macey, *Externalities*] (stating that parties are worse off when regulatory initiatives supersede private agreements).

217. See Marc Linder & Larry Zacharies, *Opening Coase's Other Black Box: Why Workers Submit to Vertical Integration into Firms*, 18 J. CORP. L. 371, 373 (1993) (stating that many firms are using temporary workers to avoid plethora of regulatory constraints existing in labor market).

218. See Macey, *Externalities*, *supra* note 216, at 194 (stating that enabling rules allow firms to modify their rules as conditions change).

219. See PAUL C. VITZ, *PSYCHOLOGY AS RELIGION: THE CULT OF SELF-WORSHIP* 93 (1977) ("To worship one's self (in self-realization) or to worship humanity is, in Christian terms, simple idolatry operating from the usual motive of unconscious egotism.").

220. See *id.* at 101 ("The individual Christian . . . has many guides to keep him [or her] away from extreme selfishness. First, there is the love of God, expressed in faith . . .").

221. See Solomon, *Perspectives*, *supra* note 38, at 223 (discussing development of self-actualization concept in humanistic psychology).

222. See Sashkin, *Participative Management*, *supra* note 141, at 10 (finding interpersonal contact to be basic need at work).

ingfulness.<sup>223</sup> Hierarchical workplaces deny these needs and, as a result, “the worker is made to feel infantile—a psychologically unnatural and unhealthy state.”<sup>224</sup>

In legal literature, a similar position is staked out by Lewis Solomon, who relies on Abraham Maslow’s “humanistic psychology” to argue, *inter alia*, that employees have a right to participate in corporate decisionmaking.<sup>225</sup> Maslow contends that humans develop in different stages, at each of which they have different needs.<sup>226</sup> Maslow’s theory is hierarchical and chronological—as people progress through the various stages, the needs typical of the next developmental level become their dominant motivators.<sup>227</sup> The first four levels are referred to as “deficiency needs”; *i.e.*, those needs that recur and must be repeatedly satisfied—physiological needs, such as food and water; safety; belongingness; and self-esteem.<sup>228</sup> The fifth, final and highest stage is the need for self-actualization, which Maslow describes as a “growth need,” one whose gratification leads to self-fulfillment and maximized potential.<sup>229</sup> According to Maslow, self-actualized individuals “are characterized by a superior perception of reality, spontaneity, autonomy, freshness of appreciation, richness of emotional reaction, improved interpersonal relations, increased creativity, increased acceptance of self, of others, and of nature.”<sup>230</sup>

Solomon uses Maslow’s hierarchy of needs to make a number of claims about corporate law, several of which relate to the problem at hand.<sup>231</sup> One is an empirical claim which states that “[m]odern business executives have sought to create a work environment in which people are encouraged to self-actualize.”<sup>232</sup> According to Solomon, this practice is exemplified by Douglas McGregor’s “Theory Y,” which is one of the theoretical underpinnings of modern participatory management.<sup>233</sup> Solomon

223. See *id.* at 10-11 (stating that three basic human work needs are autonomy, meaningful work and interpersonal, task-relevant contact).

224. *Id.* at 10.

225. See Solomon, *Perspectives*, *supra* note 38, at 221-34. (using Abraham Maslow’s humanistic psychology to support statement that decentralization of business organizations and greater employee involvement in decisionmaking leads to greater productivity).

226. See *id.* at 222-23 (citing ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* 35-47 (1954)).

227. See *id.* (stating that humans develop at different stages and are motivated by different needs at each stage).

228. See *id.* (summarizing first four needs).

229. See *id.* (discussing need for self-actualization).

230. *Id.* at 224.

231. See Lewis D. Solomon, *Humanistic Economics: A New Model for the Corporate Constituency Debate*, 59 U. CIN. L. REV. 321, 338-42 (1990) [hereinafter Solomon, *Humanistic Economics*] (stating that Maslow’s human-needs theory is basis for employee participation); Solomon, *Perspectives*, *supra* note 38, at 222 (describing how businesses have incorporated aspects of Maslow’s theory into corporate structure).

232. Solomon, *Perspectives*, *supra* note 38, at 225.

233. See *id.* at 225-26 (explaining concepts in Douglas McGregor’s “Theory Y”).

asserts that participatory firms are more productive and profitable.<sup>234</sup> The difficulty with Solomon's empirical claim, of course, is that it is not supported by the evidence. As we have seen, and as I have demonstrated elsewhere in more detail, modern participatory management is simply old wine in new skins.<sup>235</sup> It is intended to foster information channels within the firm and to prevent shirking by employees—precisely the same goals of supposedly old-fashioned Taylorism. Claims that participatory management universally—or even generally—enhances productivity and profitability also remain unproved, if they have not been affirmatively disproved.

Solomon's normative claim is that humans "need to achieve a better balance between materialistic and spiritual aspects of life."<sup>236</sup> Because corporations are created by the state, society may legitimately demand of them not "only efficient production of goods and services, but recognition of, and action toward solving, societal problems and improving the quality of life."<sup>237</sup> Although he acknowledges that some workers will prefer hierarchical organizations in the workplace,<sup>238</sup> Solomon's normative position translates into a preference for worker ownership and participation.<sup>239</sup> An ideal society, in his view, "is one that encourages change and enables each member to achieve his [or her] full potential."<sup>240</sup> This is so not only because of the superior moral and physical characteristics of self-actualized people, but also because individual self-actualization redounds to the benefits of society as a whole.<sup>241</sup> He posits that "[g]reater [worker] involvement in decisionmaking at work will allow for greater concern by individuals for other aspects of life. This concern will lead to more satisfying lives and perhaps a more effective political process in which people become involved in the decisions that affect their lives."<sup>242</sup> Social policy cannot create self-actualized people, but it can promote and encourage self-

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234. See *id.* at 226 (stating that firms with participatory programs are more profitable); Solomon, *Humanistic Economics*, *supra* note 231, at 344 (explaining that employee participation increases productivity and efficiency).

235. See Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (rejecting argument that Taylorism and participatory management fundamentally differ).

236. Solomon, *Perspectives*, *supra* note 38, at 234.

237. Solomon & Collins, *supra* note 19, at 341. This argument appears to be a variant on the old concession theory, pursuant to which the corporation was regarded as a quasi-state actor exercising powers delegated by the state. It has been a long time since mainstream corporate legal theory took the concession theory seriously. See William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 433-36 (1989) (stating that most advocates of government regulation no longer emphasize concession theory).

238. See Solomon, *Perspectives*, *supra* note 38, at 247-48 (stating that some workers prefer nonparticipation and hierarchical organizations).

239. See *id.* at 251 (noting that some employees prefer worker ownership and participation).

240. Solomon, *Humanistic Economics*, *supra* note 231, at 338.

241. See *id.* at 340 ("[S]elf-actualized people use their potentials for creative results that are beneficial to themselves and society as a whole.")

242. Solomon & Collins, *supra* note 19, at 337.

actualization.<sup>243</sup> Because bureaucratic and hierarchical workplaces stifle self-actualization, while participatory workplaces promote it, social policy should encourage employee involvement.<sup>244</sup> In one of his earliest articles on this subject, for example, Solomon proposed creating a federal agency empowered to review corporate decisionmaking mechanisms to ensure that they gave reasonable opportunity for employee involvement.<sup>245</sup> Solomon's later work acknowledges various obstacles to achieving his desired policy outcomes, which lead him to believe that some form of radical shock to the political and economic system may be necessary before they can be achieved.<sup>246</sup>

Much of my critique of Catholic social teaching on worker participation applies in full force to secular humanist literature. In particular, many of the erroneous empirical claims made by the former are echoed by the latter, especially the notion that people generally want not only meaningful work, but also the right to participate in firm decisionmaking.<sup>247</sup> Secular humanist scholarship, however, raises additional concerns that deserve close scrutiny.

Chief among these concerns is the philosophical concept of the authentic self, which is implicit in the psychological concept of self-actualization.<sup>248</sup> As Maslow constructed it, the authentic self resembles a tootsie

243. See Solomon, *Humanistic Economics*, *supra* note 231, at 341 (stating that social policy can create environment that promotes self-actualization).

244. See *id.* at 342 (describing weaknesses of bureaucratic organizations and need for decentralization to promote human growth); see also Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 WASH. & LEE L. REV. 1625, 1632 (1993) [hereinafter Solomon, *Frontier of Capitalism*] (encouraging employee involvement to achieve self-actualization).

245. See Solomon & Collins, *supra* note 19, at 351 (advocating federal agency to promote goals).

246. See, e.g., Solomon, *Frontier of Capitalism*, *supra* note 244, at 1670-71 (admitting obstacles to employee involvement).

247. See, e.g., Solomon, *Humanistic Economics*, *supra* note 231, at 344 (stating that "employees want and need control over their work"); see also Solomon, *Perspectives*, *supra* note 38, at 238-39 (asserting that employees want work that is meaningful and empowering). While Solomon now makes a more tempered set of claims that acknowledge that the search for meaningful and participatory work is not universal, the thrust of his argument still privileges those who seek self-transcendence. See *id.* at 240, 256 (stating that individuals with traditional beliefs and those who desire participatory work "must strike a balance," but concluding that employee participation in decisionmaking will lead to overall enrichment).

248. See, e.g., MASLOW, *supra* note 144, at 3-4 (discussing authentic self). In his most recent work, Solomon has somewhat backed off his reliance on Maslow's humanistic psychology in favor of something called "transpersonal psychology," which is said to connote "exceptional mental health that enables an individual to evolve to states of consciousness that transcend the normal limitations of the ego." Solomon, *Perspectives*, *supra* note 38, at 228. Transpersonal psychology is also attributed to Maslow, but to the work done at the end of his life, in which he added a sixth human need; namely, self-transcendence, the need to transcend the normal ego. See *id.* at 228-34 (explaining Maslow's idea of transcendence). According to Solomon, the shift to transpersonal psychology solves various communitarian con-

pop—there is an innate self at the core of personality, surrounded by layers of false consciousness created by social conditioning.<sup>249</sup> This authentic, presocial self is uncovered through the process of self-actualization.

Maslow's model is problematic on three levels. First, it is inconsistent with the mainstream of modern psychology. Except for humanists like Maslow, modern psychology treats the self as a mixture of innate qualities and social influences.<sup>250</sup> The two elements are not easily disentangled. The innate self is transformed by each experience and, in turn, becomes the new baseline from which further development begins.<sup>251</sup>

Second, the authentic self is normatively troubling for those of us who reject modern left-liberalism. On some issues, left-liberalism smacks of classical liberalism and modern libertarianism; on others, left-liberalism smacks of statism.<sup>252</sup> The state is thus denied the power to punish certain choices (most notably those relating to sexuality), while others (most notably those relating to economic life) are subject to paternalistic state intervention.<sup>253</sup> The authentic self is the philosophical vehicle through which left-liberalism achieves this outcome. Private consensual sexual conduct is claimed to be a product of the authentic self and thus immune from regulation, while various economic choices are defined as the inauthentic product of social influences and thus subject to regulation.<sup>254</sup> But the authentic self is too weak a reed to bear this normative load. It provides no mechanism for distinguishing authentic choices from those that are the product of social influences, except the normative preferences of the speaker.<sup>255</sup>

Third and finally, the authentic self and self-actualization are inconsistent with Western moral traditions. Here we must draw a distinction between Catholic social teaching and the secular humanist accounts. Although I believe the privileged position given work and self-fulfillment

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cerns associated with self-actualization's emphasis on individual autonomy. *See id.* at 228 (stating that weaknesses of humanistic psychology are reason for development of transpersonal psychology). In my judgment, however, the shift does not solve the problems I address below. Indeed, in some respects, transpersonal psychology compounds the problem. According to Maslow, the self-transcendent person becomes "divine or godlike." *Id.* at 231 n.72 (citing ABRAHAM H. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* 274-75 (1971)). The search for self-transcendence thus smacks of the sins of those who built the Tower of Babel, thereby adding hubris to the errors of self-actualization.

249. *See* John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289, 356-58 (1997) [hereinafter Hill, *Core Self*] (distinguishing between innate self and social self).

250. *See id.* at 359-60 (stating that most contemporary psychologists view self as multilevel layering of social and biological influences).

251. *See id.* at 360 (discussing role of experience on one's innate self).

252. *See id.* at 358 (discussing how concept of authenticity permits modern left-liberal to choose both traditional libertarianism and authoritarianism).

253. *See id.* (discussing choices that are subject to state regulation).

254. *See id.* (differentiating between private conduct and economic choices).

255. *See id.* at 360 (stating flaw of authentic self theory).



by the social teaching is both theologically and economically problematic, the social teaching is redeemed in large measure because it recognizes that self-fulfillment comes only in relation to the Deity.<sup>256</sup> In contrast, Sashkin's and Solomon's arguments are based on the secular notion that self-realization is the highest human goal and the height of emotional development.<sup>257</sup> These arguments dismiss those who pursue goals laid down by others, including believers in religious morality, as outer-directed and emotionally stunted.

Maslow's secular humanist psychology thus shifts the emphasis from God to self. Traditional concepts of virtue, which emphasize self-denial, give way to a secular psychology that emphasizes self-actualization and self-fulfillment. Maslow's emphasis on self-actualization is not the only strand of this self-centered psychology. Erich Fromm argued, for example, that vice is indifference to one's self and virtue is self-affirmation.<sup>258</sup> Carl Rogers's client-centered therapy promoted self-direction and self-confidence.<sup>259</sup> Rollo May, influenced by existentialism, stressed the process of choice as the means to becoming oneself.<sup>260</sup> As with Maslow, each was a self-confessed secular-humanist. All believed in human beings, not in God. Fromm, for example, held that if the sacred exists, its center is the self,<sup>261</sup> and Maslow held that the ideal self-actualized individual is nonreligious.<sup>262</sup>

Contrast the treatment of creativity by Maslow and its treatment in Christian thought.<sup>263</sup> Creativity is a defining characteristic of Maslow's ideally self-actualized human.<sup>264</sup> Participatory management's attractiveness for those influenced by Maslow stems from the resulting emphasis on self-expression. By encouraging workers to express their creativity, employee involvement helps them become more fully self-actualized. Christi-

256. See, e.g., CENTESIMUS ANNUS, *supra* note 2, ¶ 41, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 463 (stating that through gift of self and relationship with God, people will find themselves).

257. See Solomon, *Perspectives*, *supra* note 38, at 223 (stating that self-actualization is highest level of fulfillment person can obtain); see also Sashkin, *Participative Management*, *supra* note 141, at 14 (noting that organizations that do not meet workers' need for self-realization will have considerable costs).

258. See VITZ, *supra* note 219, at 19 (explaining "that the character structure of the mature and integrated personality, the productive character constitutes . . . 'virtue,' and that 'vice,' . . . is indifference to one's own self and self-mutilation").

259. See *id.* at 21 (noting that Rogers's therapy promotes self-direction and self-confidence).

260. See *id.* at 26 (commenting that May emphasized that role of choice is essential in becoming oneself).

261. See *id.* at 20 (stating that if sacred exists, its center is in self and "selves of others").

262. See *id.* at 24 (stating that secularization correlates with self-actualization).

263. See *id.* at 23, 102 (comparing idea of creativity in Christian thought and Maslow's theory).

264. See *id.* at 23 (noting that Maslow referred to creativity as "universal hallmark" of ideal person).

anity rejects an emphasis on original or creative self-expression.<sup>265</sup> Instead, Christian creativity finds expression through reflecting the eternal beauty of the divine.<sup>266</sup> Put another way, because humans were created in God's image, they should imitate God's creative work.<sup>267</sup> In doing so, humans become not self-actualized, but virtuous. Indeed, the virtues associated with a free-market economy—honesty, industriousness, patience, deferred gratification and the like—are all extolled by the Church.<sup>268</sup>

Sashkin's and Solomon's analysis also differs from Christianity in its view of work.<sup>269</sup> Protestantism views work as a calling from God to be approached in an attitude of service.<sup>270</sup> An important strain of Catholic thought, represented by Michael Novak, takes a similar view of work.<sup>271</sup> In this tradition, work is not an occasion for self-actualization, but rather a calling from God.<sup>272</sup> Treating work as a vocation, however, does not necessarily mean that work is supposed to be a means of self-fulfillment. The Fall's direct consequence, as we have seen, was to render much of work inherently boring and unfulfilling.<sup>273</sup> Being granted the right to participate in decisions about unfulfilling work seems unlikely to transform that work into something fulfilling. Tedium and painful toil will still await some workers, no matter how democratic we make the workplace decision-making process.

Besides its rejection of traditional Western religion, the secular humanist view of self-actualization also conflicts with a proper understanding of human nature.<sup>274</sup> Those who wish humans to become self-actualized

265. See *id.* at 102 (emphasizing that Christians should develop their abilities to serve God better rather than focus on being creative).

266. See *id.* (noting that creating beauty comes through reflection of eternal beauty and wisdom).

267. See *id.* at 91, 102-04 (stating that because God created humans in God's image, creativity should reflect eternal wisdom).

268. See Oliver F. Williams, *Introduction to CO-CREATION AND CAPITALISM*, *supra* note 134, at 1, 9 (noting that habits and virtues required to participate in free market, such as honesty, industriousness, patience and deferred gratification, are extolled by Church).

269. For a discussion of Sashkin's and Solomon's views of work as a means of self-actualization, see *supra* notes 222-46 and accompanying text.

270. See Roger B. Hill, *History of the Work Ethic* (visited Jan. 15, 1999) <<http://www.coe.uga.edu/~rhill/workethic/hist.htm>>.

271. See generally MICHAEL NOVAK, *BUSINESS AS A CALLING: WORK AND THE EXAMINED LIFE* (1996) [hereinafter NOVAK, *BUSINESS AS A CALLING*] (describing work, particularly business, as calling from God).

272. See *id.* at 38-39.

273. Even work performed by professional elites can be quite tedious, as any law firm associate will confirm. See David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Firms*, 84 VA. L. REV. 1581 (forthcoming 1999) (describing unrewarding "paper work" performed by many law firm associates).

274. See Solomon, *Perspectives*, *supra* note 38, at 232 (discussing transpersonal theories). Solomon's most recent work in this area goes beyond secular humanism

believe that humans are intrinsically good, and that evil or vice comes into the world through socialization that denies the self its potential for growth and fulfillment.<sup>275</sup> The pursuit of self-fulfillment is the highest human goal, and all humans have the capacity to become fully self-actualized.<sup>276</sup> Maslow thus provided the psychological basis upon which modern left-liberalism grounds its belief that education, positive legislation and alteration of environment can produce humans like gods.<sup>277</sup> This belief denies that humanity has a natural proclivity toward violence and sin.<sup>278</sup> In contrast, a strong strand of traditional Western thought is far more skeptical about human perfectibility.<sup>279</sup>

The imperfectibility of humans is, of course, a basic tenet of Christianity.<sup>280</sup> The Church regards the vices of pride, vanity, jealousy, greed and insatiable desires as an intrinsic part of human nature since the "Fall of Man."<sup>281</sup> This theological claim is confirmed by studies of both human and animal behavior. The vast weight of evidence suggests that aggression is an intrinsic property of human nature.<sup>282</sup> In contrast, Maslow's studies of purportedly self-actualized individuals have been criticized as scientifically flawed.<sup>283</sup> Maslow had no control group and he did not preserve data on how his subjects were selected.<sup>284</sup> As B.F. Skinner asked of Carl Rogers, "What evidence is there that a client ever becomes truly *self-directing*?"<sup>285</sup>

Christianity sets forth not self-perfection, but self-denial, as an aspiration.<sup>286</sup> It teaches not self-love, but rather an orientation towards God and other people.<sup>287</sup> To be sure, there is a Christian form of self-affirmation,

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to draw explicit and approving analogies to "Eastern religions and non-Western psychologies." *Id.*

275. *See id.* at 243 (proposing that human nature is essentially good).

276. *See* MASLOW, *supra* note 144, at 46-47 (discussing need for self-actualization).

277. *See* John Lawrence Hill, *Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberalism*, 26 SETON HALL L. REV. 92, 133 (1995) [hereinafter Hill, *Mill, Freud, and Skinner*] (discussing process by which humans become like gods).

278. *See* VITZ, *supra* note 219, at 41, 45 (discussing convictions of "selfists" regarding intrinsic goodness); *see also* Hill, *Mill, Freud, and Skinner*, *supra* note 277, at 133; *cf.* Solomon, *Perspectives*, *supra* note 38, at 243 (stating that "we are mostly good").

279. *See* VITZ, *supra* note 219, at 49 (criticizing selfist position that human nature is primarily good).

280. *See id.* at 91 (recognizing that people are sinful).

281. *See id.* (discussing sinful nature of humans).

282. *See id.* at 38 (stating that aggression is present in humans at birth).

283. *See id.* at 42 (criticizing Maslow's studies of purportedly self-actualized individuals).

284. *See id.* (observing that clinical setting does not satisfy rigid scientific standards).

285. *Id.* at 51.

286. *See id.* at 91 (noting that Christian purpose is to "lose the self").

287. *See id.* at 96 (discussing Commandments' precedence over self-love).

but it is not the humanist's unqualified affirmation of the self. Christians affirm only those aspects of the self that derive from our creation in God's image (*e.g.*, rationality, moral responsibility and the capacity for love), while denying those aspects of the self deriving from the Fall (*e.g.*, selfishness, covetousness, malice, hypocrisy and pride). Agape love—the highest Christian virtue—requires the sacrifice of self in the service of others.<sup>288</sup> Thus, Christian forms of self-affirmation include a strong element of self-denial.

Indeed, Christians ought to view the search for self-actualization as quite sinful. Maslow and others thought that low self-esteem was a great obstacle to self-fulfillment.<sup>289</sup> In the quest to bring humans to realize their full potential (to become fully self-actualized), they therefore promoted high self-esteem.<sup>290</sup> Thus, the self remains the focal point of both the problem and its cure. For Christians, called upon to lose themselves, this is the sin of idolatry, which is the personification and deification of the human will.<sup>291</sup>

### C. *The Revolt of the Elites*

At least insofar as secular humanist argument is concerned, query whether we face what might be called a "Revolt of the Elites" problem.<sup>292</sup> The reference, of course, is to Christopher Lasch's argument that the values and attitudes of the professional and managerial elites, and those of the working classes, have dramatically diverged.<sup>293</sup> In that regard, consider John Witte's finding that activist employees, defined as those most likely to seek an active role in participatory management, were atypical in a number of significant respects.<sup>294</sup> They tended to be white males who were younger, more politically active and better educated than their peers.<sup>295</sup> They also tended to be far more ambitious than their peers,

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288. See *id.* at 100 (describing Christian love as "[s]trong, outflowing love of each particular human being, warts and all").

289. See MASLOW, *supra* note 144, at 45 (discussing "esteem needs").

290. See *id.* at 46-47 (discussing self-actualization).

291. See VITZ, *supra* note 219, at 93 (noting that worshipping one's self or humanity is idolatry).

292. Cf. Hauerwas, *supra* note 150, at 48-49 (describing Pope John Paul II's view of work as "romantic and elitist"); MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* 434-35 (1982) [hereinafter NOVAK, *DEMOCRATIC CAPITALISM*] (noting that antipathy to capitalism is highest among certain elites, including clergy).

293. See LASCH, *supra* note 84, at 25-41 (analyzing divergence of values and attitudes between working class and elite classes).

294. See WITTE, *supra* note 162, at 54 (stating that activist employees "were not typical members of the workforce").

295. See *id.* (describing characteristics of activist employees). One study of participation schemes in Australia found that such programs appear to be more effective when the work force is homogeneous. See Drago, *supra* note 176, at 59 (providing insight into Australian programs). If this is also true of American workers, this implies that employee involvement programs will be adversely affected by current legal and market conditions relating to diversity in the workplace.

while simultaneously being less tractable to supervision.<sup>296</sup> Is it instructive that, setting aside race and gender, Witte's description of activist employees is a fair description of most academics?

If academic and other cultural elites have a taste for participating in decisions affecting them that is not necessarily shared by workers, the secular humanist argument becomes another form of monistic perfectionism. It fails to allow for the diversity of preferences revealed by human experience. Worse yet, it fails to recognize that people are fulfilled in part by choosing not only their own preferences, but also how to pursue them. George Bernard Shaw's reworking of the Golden Rule seems apt: "Do not do unto others as you would have that they do unto you. They may have different tastes."<sup>297</sup>

#### IV. HUMAN DIGNITY

Human dignity is a major emphasis of both Catholic social teaching and the secular humanist literature.<sup>298</sup> Marleen O'Connor, for example, expects firms to recognize that "employee participation in workplace governance is valuable because it achieves human values by enhancing worker dignity."<sup>299</sup> Catholic social teaching goes even further, treating human dignity as the very well-spring of human rights.<sup>300</sup> Pope John Paul II, for example, affirms "the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very nature the subject of rights which no one may violate."<sup>301</sup>

The difficulty with arguments founded on assertions about human dignity is illustrated by those that rely on variants of the categorical imperative; *i.e.*, the Kantian claim that individuals are entitled to be treated as an

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296. See WITTE, *supra* note 162, at 55-56 (finding differences between activist employees and other employees in amount of ambition).

297. KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 24 (1974).

298. See, *e.g.*, BISHOPS' LETTER, *supra* note 39, ¶¶ 13-14, *reprinted in* THE CATHOLIC CHALLENGE, *supra* note 39, app. (describing human dignity as essential right).

299. Marlene O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Agreements* [hereinafter O'Connor, *Promoting Economic Justice*], in *PROGRESSIVE CORPORATE LAW* 234 (Lawrence Mitchell ed., 1995).

300. See SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* (1965) [hereinafter *GAUDIUM ET SPES*], *reprinted in* *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 157 (revealing teachings of human dignity).

301. CENTESIMUS ANNUS, *supra* note 2, ¶ 44.1, *reprinted in* *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 466-67; *see id.* ¶ 11.2, *reprinted in* *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 440 (stating that "beyond the rights which man acquires by his own work, there exist rights which do not correspond to any work he performs but which flow from his essential dignity as a person"); *see also* *LABOREM EXERCENS*, *supra* note 123, ¶ 9.3, *reprinted in* *PROCLAIMING JUSTICE & PEACE*, *supra* note 2, at 366 (stating that humans "should not experience a lowering of [their] own dignity" in work).

end in themselves, not as a means to someone else's end.<sup>302</sup> One sees echoes of this view in some natural law scholarship, notably that of John Finnis, who opines that individuals are entitled to the dignity of being responsible moral agents, which requires that they not be made "to live their lives for the convenience of others."<sup>303</sup> Some of those holding such views further assert that individuals are therefore entitled to participate in the decisions that affect them.<sup>304</sup> But why? As a general matter, the categorical imperative's indeterminacy is "notorious."<sup>305</sup> Moreover, conceding arguing the categorical imperative's validity, its relevance to participatory management is not obvious. In most systems of government other than New England town meetings, for example, citizens do not have the right to participate directly in decisions that affect them. Why should economic life be different?

My point is not that concern for human dignity is irrelevant to the moral status of participatory management. My point is only that human dignity is an indeterminate concept requiring greater specification and assessment. In Catholic social teaching, substantial content is given to the concept of human dignity by reference to the quest for self-fulfillment, which we have already examined.<sup>306</sup> A review of the literature, however, identifies three distinct ways in which further content might be given to the concept of human dignity as it relates to employee involvement. First, participation in corporate decisionmaking may promote trusting relationships between employees and employers.<sup>307</sup> Second, employee involvement purportedly promotes workplace democracy.<sup>308</sup> Third and finally, participation may protect important employee interests.<sup>309</sup>

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302. See Peter J. Riga, *Authority in Morality*, 41 AM. J. JURIS. 307, 311 (1996) ("The Kantian demand is to treat others as yourself, as ends, as persons and never as means.").

303. FINNIS, NATURAL LAW, *supra* note 28, at 272.

304. See generally Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65 (1995) (arguing that individuals are entitled to participate in decisions that affect them); see also Manuel G. Velasquez, *Ethics, Religion and the Modern Business Corporation*, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, at 55, 60 (asserting that individuals have right to self-determination).

305. See BUDZISZEWSKI, WRITTEN ON THE HEART, *supra* note 198, at 198 (discussing "emptiness of . . . Categorical Imperative").

306. See, e.g., MATER ET MAGISTRA, *supra* note 158, ¶ 83, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 97 (arguing that human dignity is served by quest for self-fulfillment).

307. For a discussion of how participation in corporate decisionmaking may promote trusting relationships between employees and employers, see *infra* notes 310-431 and accompanying text.

308. For a discussion of how employee involvement may promote workplace democracy, see *infra* notes 432-74 and accompanying text.

309. For a discussion of how employee participation may protect employee interests, see *infra* notes 475-549 and accompanying text.

## A. Trust

A number of scholars have advanced trust-based arguments in favor of government-mandated employee involvement.<sup>310</sup> In legal literature, the most visible proponent of such arguments is Marleen O'Connor, who contends that labor-management relations policy must take into account "goodwill trust," which she defines as "the feeling that trading partners possess a moral commitment to maintain the relationship."<sup>311</sup> At the core of her argument is Harvey Leibenstein's concept of X-inefficiency, which is the gap between the firm's actual productive output and the output level that could be achieved under ideal circumstances.<sup>312</sup> The size of this gap is supposedly affected by the way in which a firm treats its employees. As the theory goes, workers who view their job as part of a collaborative process will shirk less than workers who are subjected to traditional hierarchical monitoring.<sup>313</sup>

Leibenstein explains that firms have an incentive to increase profits by obtaining the maximum amount of work effort at the lowest cost in terms of working conditions. Similarly, workers have an incentive to obtain the best working conditions in return for the lowest amount of effort possible. Under the prisoners' dilemma solution, employees supply the lowest effort possible, regardless of the motivations provided by managers. Similarly, managers will provide low motivations, regardless of the effort put forth by employees. In contrast, if the parties trust each other to cooperate, it is possible to attain the "golden rule solution," in which employees provide maximum effort in return for optimal working conditions and wages.<sup>314</sup>

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310. See, e.g., O'Connor, *Promoting Economic Justice*, *supra* note 299, at 222 (discussing trust-based argument for mandatory employee involvement); Hyde, *supra* note 166, at 191-94 (advancing trust-based justification for employee ownership of enterprise).

311. O'Connor, *Promoting Economic Justice*, *supra* note 299, at 222.

312. See generally HARVEY LEIBENSTEIN, *INSIDE THE FIRM: THE INEFFICIENCIES OF HIERARCHY* (1987) (deriving and demonstrating efficacy of X-inefficiency); see also O'Connor, *Promoting Economic Justice*, *supra* note 299, at 224 (discussing inefficiency due to less than ideal circumstances).

313. Cf. O'Connor, *Promoting Economic Justice*, *supra* note 299, at 224 (discussing circumstances under which workers shirk).

314. O'Connor, *Human Capital Era*, *supra* note 17, at 920. Note that O'Connor treats the management-labor relationship as a prisoners' dilemma for purposes of game theoretic analysis. I have elsewhere questioned the utility of game theory in this context and, assuming *arguendo* its utility, the validity of O'Connor's conclusions. See Bainbridge, *Participatory Management*, *supra* note 5, at 712-16 (discussing "current fad" of game theory). One issue I raised in that earlier article was whether the prisoners' dilemma is the correct game theory model for the employment relationship, noting that some aspects of labor relations are better modeled as a chicken game. See *id.* at 713. Although I do not want to rehash those arguments here, it is worth noting that the relevant game theory model in fact appears to be what Robert Ellickson refers to as the specialized-labor game.

Building interpersonal trust between workers and managers is thus a critical goal for O'Connor. She contends that trust evolves over time in a relationship from small things to larger matters as the partners prove themselves to be trustworthy.<sup>315</sup> Further, she opines that trust arises as feelings of fellowship develop.<sup>316</sup> Because O'Connor believes that participatory management provides a vehicle for these sort of trust-building activities, she proposes that corporate law not only mandate employee participation committees resembling German works councils, along with a duty to disclose corporate information to employees,<sup>317</sup> but also create director fiduciary duties to employees.<sup>318</sup> Because she also believes that workers and managers cannot reach the "golden rule" outcome on their own, she contends that government intervention is necessary.<sup>319</sup> In contrast, I have elsewhere argued that there is no market failure justifying

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See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 162-64 (1991) (discussing specialized-labor game).

A prisoners' dilemma is the appropriate model for a coordination problem in which the cooperative outcome is reached when all players provide identical labor. See *id.* at 209 (noting that described coordination problem is "best modeled as a Prisoner's Dilemma"). When players have asymmetric abilities and the largest pay-off occurs when only the cheapest labor provider works, which seems to be an accurate description of the corporate-employee relationship, the specialized-labor game is a better model. See *id.* at 210. In social relationships involving prisoners' dilemma, we expect a social norm requiring everyone to contribute, without prospect of reward, to producing the good in question. See *id.* at 209 (discussing function of prisoners' dilemma in close-knit groups). The Golden Rule is an example of such a norm. In specialized labor situations, however, shirking is the dominant choice. See *id.* at 162-64 (discussing specialized-labor game and concluding that shirking is dominant choice for each player involved). Cooperative outcomes in this game are achieved not through trust-based social norms, but through voluntary contracting. See *id.* at 211 ("In most Specialized Labor situations in a market economy, cooperative outcomes are reached through contractual exchange."). Contracts are a superior solution (*vis-à-vis* social norms) to specialized-labor games because they are the most effective means of rewarding unique skills. See *id.* at 247 (noting that contracts are effective at rewarding "those who have gone to the trouble of acquiring special skills"). Where contracting is impracticable, we observe rewards (such as high social status) for those who perform unusually well. See *id.* at 211 (discussing situations in which contracts are not economical). The key point, however, is that social norms of trust are inapt for specialized-labor games. Trust is not going to achieve the "golden rule" solution when specialized labor is the correct model. Thus, social policies designed to promote workplace trust are likely to be unavailing.

315. See O'Connor, *Promoting Economic Justice*, *supra* note 299, at 223 (stating that trust evolves from small to large matters).

316. See *id.* (stating that fellowship aids in development of trust).

317. See *id.* at 261-63 (proposing that corporate law mandate employee participation committees and impose duty to disclose corporate information).

318. See *id.* at 254-61 (proposing that corporate law create fiduciary duties to employees). I have elsewhere rejected proposed fiduciary duties similar to those put forward by O'Connor. See Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1437 (1993) [hereinafter Bainbridge, *Shareholder Wealth*].

319. See O'Connor, *Promoting Economic Justice*, *supra* note 299, at 343 (demanding legal intervention because parties cannot reach golden rule on their own).



government intervention.<sup>320</sup> In this Article, I want to make two somewhat different points. First, government intervention would be unavailing because participatory management will not promote trust between workers and managers. Second, whatever one makes of the instrumental aspects of the debate, there is no trust-based natural law justification for government intervention.

### 1. *The Instrumental Value of Trust*

I do not take issue with the general proposition that trust has instrumental value. Transaction costs are the economic equivalent of the physical phenomenon of friction. Just as friction reduces the efficiency of a machine, transaction costs are a dead weight loss making transacting less efficient.<sup>321</sup> Contracts are a useful, but ultimately imperfect, device for minimizing transaction costs.

In many settings, contracts are necessarily incomplete. Three closely-related factors are at work here—opportunism, uncertainty and complexity.<sup>322</sup> Opportunism is a critical component of any transaction cost schedule. Parties to a contract are inevitably tempted to pursue their own self-interest at the expense of the collective good. Uncertainty reflects the difficulty parties have in predicting the conditions they will face in the future. Complexity arises when the parties attempt to specify contractually how they will respond to a given situation. As the relationship's term lengthens, it necessarily becomes more difficult to foresee the needs and threats of the future, which in turn presents an ever-growing myriad of contingencies to be dealt with. The more contingencies to be accounted for and the greater the degree of uncertainty that is present, the more difficult it becomes for the parties to draft completely specified contracts.<sup>323</sup> Indeed, the phenomenon of bounded rationality, which becomes important in the presence of uncertainty and complexity, implies that making complete

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320. See Bainbridge, *Participatory Management*, *supra* note 5, at 712-18 (arguing that there is no market failure justifying government intervention).

321. See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 1-2 (1985) [hereinafter WILLIAMSON, *ECONOMIC INSTITUTIONS*] (stating that transaction costs reduce transaction efficiency).

322. See Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 464-65 (1992) [hereinafter Dooley, *Two Models*] (arguing that opportunism, uncertainty and complexity create incomplete contracts). The three factors are not wholly independent. Uncertainty can result from opportunistic behavior, for example, where there is strategic nondisclosure or deliberate distortion of information. See WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 321, at 57 (discussing connection among opportunism, uncertainty and complexity).

323. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES* 23 (1975) [hereinafter WILLIAMSON, *MARKETS*] (noting that under conditions of uncertainty and complexity, it becomes "very costly, perhaps impossible, to describe the complete decision tree").

contracts is at best costly and may prove impossible.<sup>324</sup> Given the limits on cognitive competence implied by bounded rationality, incomplete contracts are the inevitable result of uncertainty and complexity.<sup>325</sup>

Because *ex ante* contracting is often an imperfect solution, parties frequently rely on noncontractual social norms to minimize transaction costs.<sup>326</sup> Trust, for example, acts as a lubricant to reduce social friction.<sup>327</sup> If I trust you to refrain from opportunistic behavior, I will not invest as many resources in *ex ante* contracting. "He who is faithful with that which is least is also faithful with that which is much . . ." <sup>328</sup> If you prove trustworthy, I will not need to incur *ex post* enforcement costs. Thus, trust is not only honorable, it is socially useful.<sup>329</sup>

In my judgment, however, trust-based justifications for government-mandated employee involvement founder on several grounds. Consider first the empirical data recounted above.<sup>330</sup> Assuming participatory man-

324. See generally WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 321, at 30-32, 45-46 (defining bounded rationality and describing its effects on contracting process).

325. See Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, 4 J.L. ECON. & ORG. 119, 121-25 (1988) (arguing that transaction costs are pervasive and large, which leads to theory of firm premised on transaction cost minimization). These costs are further compounded by the secondary and tertiary costs associated with enforcement mechanisms.

326. The classical example is Stewart Macaulay's study of social norms in Wisconsin business firms. See generally Stewart Macauley, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963) (finding that norms of fair dealing are significant constraint on business behavior).

327. See ARROW, *supra* note 297, at 23 ("Trust is an important lubricant of a social system. It is extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people's word.").

328. *Luke* 16:10.

329. There is nothing inconsistent between the notion that people honor their commitments and a model of human behavior based on rational choice. Consistently trustworthy behavior sends a message about reliability that pays long-term benefits under many (albeit not all) market conditions. Game theorists have identified some very strong incentives for individuals to behave cooperatively. Consider, for example, that one powerful strategy in an infinitely repeated game is to play on a "tit-for-tat" basis: Player 1 begins by cooperating, and then chooses in each subsequent round to play as Player 2 did on his or her previous choice. In effect, "tit-for-tat" can train the opposing player to be cooperative. See generally J. KEITH MURNIGHAN, *BARGAINING GAMES* 81-84 (1992) (exploring valuable role trust can play).

330. Why should participation in the decisionmaking process promote trust between employee and employer? Trust is a belief that the other person is trustworthy, which in turn is a belief that he or she will keep his or her commitments. Institutional arrangements that make commitments credible thus ensure trustworthiness and thereby promote trust. See Russell Hardin, *Trustworthiness*, 107 ETHICS 26, 32 (1996) (discussing promotion of trust). Thus, the most plausible connection between participation and trust is that the former helps prevent untrustworthy (i.e., opportunistic) conduct by the employer. If so, the instrumental account of trust offered by O'Connor and others also arguably collapses into a variant of the self-protection account. For a discussion of the self-protection account, see *infra* notes 475-549 and accompanying text.

agement promotes trust between workers and managers, we ought to see that reflected in empirical evidence of enhanced productivity and profitability. As noted above, the empirical evidence is mixed, at best. In addition, the empirical evidence that many workers prefer hierarchical workplaces further undercuts the claim that participatory management can promote trust between workers and managers.

Conceding that the empirical evidence is flawed and therefore assuming *arguendo* that participatory management might nevertheless have the beneficial effects ascribed to it, I remain unpersuaded. Those who favor trust-based explanations of participatory management frequently contrast U.S. industrial relations to those of Germany and Japan.<sup>331</sup> As the story usually goes, the competitive prowess of German and Japanese firms can be attributed to the high levels of trust found in such firms, which in turn can be attributed to the participative work practices followed by such firms.<sup>332</sup> On close examination, however, this story breaks down at several critical points.

To be sure, as Francis Fukuyama has demonstrated, U.S. workplaces are low-trust environments.<sup>333</sup> In many firms, workers and managers simply do not trust each other very much. In contrast, Japanese and German workplaces are said to be characterized by high levels of trust.<sup>334</sup> Is this disparity causally linked to the degree of employee participation practiced by firms in these countries? Certainly, labor relations in the three differ rather dramatically in a number of regards, including the degree to which employees are involved in decisionmaking processes. In the United States, the dominant mode of industrial relations has long been so-called scientific management, at whose door Fukuyama contends much of the blame for low levels of trust in U.S. workplaces can be laid.<sup>335</sup>

In the early part of this century, Frederick W. Taylor developed the most famous form of what came to be called "scientific management."<sup>336</sup> Taylorism was directed at a persistent information asymmetry between workers and managers.<sup>337</sup> Pre-Industrial Revolution workplaces were characterized by persistent information asymmetries favoring workers and

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331. See, e.g., O'Connor, *Human Capital Era*, *supra* note 17, at 945 (discussing participatory relationships in Germany and Japan).

332. See *id.* at 901 (discussing role of trust in German and Japanese firms).

333. See FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 255 (1995) [hereinafter FUKUYAMA, *TRUST*] (stating that American workplaces are low-trust environments).

334. See *id.* at 10 (stating that Japanese and German workplaces are high-trust environments).

335. See *id.* at 226 (arguing that scientific management created declining trust in American workplaces).

336. See COTTON, *supra* note 14, at 4-5 (crediting Taylor with development of "scientific management").

337. See Johanna Oreskovic, *Capturing Volition Itself: Employee Involvement and the Team Act*, 19 BERKELEY J. EMP. & LAB. L. 229, 273 (1998) (discussing information asymmetries and Taylorism).

a resulting high degree of control by those workers.<sup>338</sup> Craftspeople were highly trained and knew a great deal about the production process.<sup>339</sup> Taylor recognized that workers who knew more than management about the production process could shirk by controlling the pace of production.<sup>340</sup> With the coming of the Industrial Revolution and assembly line production, however, it became possible to redesign the workplace so as to shift control to managers.<sup>341</sup> Taylor wanted to take advantage of those possibilities to reverse the information asymmetry in management's favor.<sup>342</sup>

Taylor required managers to use time and motion studies to identify the ideal method of performing each step in the production process.<sup>343</sup> Managers then were to impose that method on workers. To achieve this goal, Taylor adopted three core principles: (1) distillation of craft knowledge into work rules taught to employees; (2) advance planning of production processes by management; and (3) elimination of the need for thinking or learning by workers.<sup>344</sup> These principles were implemented by industrial engineers and management experts, who broke down a given production process into a large number of small steps, each allocated to a single worker who was closely supervised.<sup>345</sup> Hence the narrow job descriptions typical of Taylorism, because shirking could be easily detected when employees are only charged with performing a single task. Hence also Taylorist compensation schemes based on the old maxim "a fair day's pay for a fair day's work,"<sup>346</sup> which was possible precisely because the employees' narrow job descriptions and close supervision allowed pay to be closely linked to productivity.

According to Fukuyama, Taylorism had deleterious effects on U.S. industrial relations.<sup>347</sup> It sent workers a clear message that they were not

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338. For a discussion of information asymmetries generally, see *id.*

339. See Geu & Davis, *supra* note 146, at 1685-87 (stating that craftspeople were highly trained and knowledgeable).

340. Cf. Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 71, 141-42 (1988) (stating that workers had power to control production rate under certain circumstances).

341. See Geu & Davis, *supra* note 146, at 1686 ("After the Industrial Revolution . . . the organization of the workplace became far more impersonal.").

342. See COTTON, *supra* note 14, at 4-5 (providing general discussion of Taylorism).

343. See Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1808 (1993) (stating that scientific management required managers to identify each step of production process).

344. See COTTON, *supra* note 14, at 5 (citing three core principles of Taylor); Geu & Davis, *supra* note 146, at 1690 (same).

345. Cf. WEILER, *supra* note 164, at 196 (demonstrating implementation of three core principles).

346. Richard E. Walton, *From Control to Commitment in the Workplace*, HARV. BUS. REV., Mar.-Apr. 1985, at 76, 78.

347. See FUKUYAMA, TRUST, *supra* note 333, at 226-27 (noting deleterious effects of Taylorism on American industrial relations).

trusted. It also promoted an adversarial and legalistic approach to collective bargaining. A downward spiral of growing distrust resulted.<sup>348</sup>

Although the German and Japanese systems differ dramatically from each other, both entail a higher degree of employee involvement than does scientific management.<sup>349</sup> Because the German system is based on statutory mandates comparable to those proposed by the academics to whose work this Article responds, I will focus mainly on the German system at the expense of the Japanese system.<sup>350</sup> The German codetermination system, as created by statute, includes two important elements. First, there is a dual board structure—a supervisory board that appoints a managing board, with the latter actively operating the firm.<sup>351</sup> Workers are represented only on the former.<sup>352</sup> The supervisory board concept is difficult to translate into terms familiar to those trained exclusively in U.S. forms of corporate governance. Its statutory mandate is primarily concerned with the appointment and supervision of the managing board.<sup>353</sup> In theory, employees and shareholders are equally represented on the supervisory board. In practice, however, the board is often controlled either by the firm's managers or a dominant shareholder.<sup>354</sup> One of the employee representatives must be from management, and shareholders are entitled to elect the chairperson of the board, who has the power to break tie votes.<sup>355</sup> If push comes to shove, shareholders thus retain a slight but potentially critical edge.

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348. See *id.* (noting spiral of growing distrust that resulted from Taylorism).

349. This Article will focus primarily on the German codetermination system. For a discussion of the German codetermination system, see *infra* notes 350-60 and accompanying text.

350. See Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 204 (1994) (noting that there are at least four different models of participatory management in Germany). Some other member-states of the European Union also have some form of employee representation, and there have long been proposals to develop harmonized company laws or even a European Union-wide company law that would provide for employee representation. See Terence L. Blackburn, *The Societas Europea: The Evolving European Corporation Statute*, 61 FORDHAM L. REV. 695, 743-55 (1993) (discussing draft proposal for harmonization of natural company law). Unless otherwise indicated, discussion of codetermination in this Article focuses on the 1976 German codetermination statute, which applies to corporations having more than 2000 employees.

351. See COTTON, *supra* note 14, at 118 (noting dual board structure in German codetermination system).

352. See *id.* (noting worker presence only on supervisory boards).

353. See Hopt, *supra* note 350, at 204 (discussing statutory mandate of supervisory boards).

354. See *id.* (noting that managers or dominant shareholders often control board).

355. See MOTOHIRO MORISHIMA ET AL., *INDUSTRIAL DEMOCRACY IN SELECTED PACIFIC RIM AND EUROPEAN COUNTRIES* 23 (1995) (discussing chairperson's power to break ties).

The other component of German codetermination is the works council, which somewhat resembles U.S. operational participation.<sup>356</sup> Works councils are concerned with issues affecting individual plants rather than the whole firm.<sup>357</sup> In theory at least, works councils have considerable control over shop floor and other issues that affect the personnel of a particular plant.<sup>358</sup> Depending on the nature of the issue at hand, the council may be entitled to provision of information, consultation with management or codetermination.<sup>359</sup> Their statutory mandate ranges from such minor issues as individual personnel grievances to such major concerns as the introduction of new technology or plant closings.<sup>360</sup>

Conceding that German workers have greater opportunities for formal participation in firm decisionmaking than do workers of U.S. firms in which scientific management is still practiced, those differences lack both instrumental and normative traction. My argument runs through several steps. First, it is not clear that the German system of employee involvement has the instrumental benefits ascribed to it by proponents of government mandates. Second, the differing treatment of employee involvement among these nations is properly ascribed to politics and not the degree of workplace trust exhibited in their firms. Third and finally, government-mandated employee involvement will not increase the level of trust in U.S. workplaces.

As to the instrumental utility of employee involvement, it appears to be less successful in Germany than is commonly thought.<sup>361</sup> Codetermination has been found to have the least impact on productivity and employee attitudes of any participatory management scheme.<sup>362</sup> Indeed, many studies of codetermination have shown it to have negative productivity results.<sup>363</sup> One recent meta-analysis of codetermination studies confirmed these findings, concluding "that worker participation in decision making imposed by government decree is negatively associated with productivity."<sup>364</sup>

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356. *See id.* at 21 (discussing works councils).

357. *See id.* (discussing concerns and focuses of works councils).

358. *See id.* at 21-23 (discussing control of works councils).

359. *See id.* at 21 (discussing works councils' entitlement to information, consultation or codetermination).

360. *See id.* at 21-22 (noting range of statutory mandate).

361. *See* COTTON, *supra* note 14, at 78 (discussing success of quality circles in Japanese firms). According to one study, only one-third of the quality circles used by Japanese firms have proven successful over time. *See id.* Employee involvement is also less pervasive in Japan than is commonly thought.

362. *See id.* at 232 (finding codetermination to have least impact of any participatory management scheme).

363. *See id.* at 119 (noting that many studies of codetermination show negative results).

364. Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58, 69 (1995).

Similar doubts about the economic viability of the German labor relations system are revealed when we turn to data on relative competitiveness. Although proponents of government-mandated employee involvement frequently assert that German (and Japanese) firms are more efficient than U.S. firms because of their greater levels of employee participation in corporate governance, I find these arguments unpersuasive.<sup>365</sup> American enterprise long prevailed in world economic competition.<sup>366</sup> Moreover, despite the conventional wisdom about German and Japanese competitive success, American enterprise in many respects is still winning the competitiveness war.<sup>367</sup> According to a recent competitiveness ranking by the International Institute for Management Development, the United States ranked first every year from 1993 to 1997.<sup>368</sup> In contrast, Japan fell from second in 1993, to fourth in 1995 and to ninth in 1997.<sup>369</sup> Likewise, Germany fell from fifth in 1993, to tenth in 1996 and to fourteenth in 1997.<sup>370</sup>

Assuming *arguendo* that employee involvement has instrumental benefits, there is still a chicken and egg problem here. Does Germany have high levels of workplace trust because it has widespread employee involvement or vice-versa? O'Connor's argument that government-mandated employee involvement will promote trust assumes that causation runs in the former direction. In contrast, I suspect that the causation arrow points in the latter. Law cannot be expected to develop universal patterns:

For [people's] circumstances vary mightily one from another—affected by climate, by soil, by extent of a country, by historic experience, by customs and habits, by strategic situation, by commerce and industry, by religion, by a multitude of other influences. Therefore every people develop their own particular laws, and rightly so.<sup>371</sup>

There are radical differences between U.S. and German (or Japanese) culture and law that pervasively affect the employment relationship.<sup>372</sup> It is

365. See, e.g., O'Connor, *Human Capital Era*, *supra* note 17, at 912-13 (arguing that German firms are more efficient than U.S. firms due to higher employee participation).

366. See MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 254 (1994) (noting that America has long prevailed in economic competition).

367. See Hobart Rowen, *Challenging Convention on Productivity*, WASH. POST, Nov. 22, 1992, at H1 (noting that American enterprise is still winning competitiveness war).

368. See International Institute for Management Development, *World Competitiveness On-Line: The World Competitiveness Scoreboard* (visited Oct. 10, 1998) <<http://www.imd.ch/wcy/factors/overalldata.html>> (ranking countries' competitiveness).

369. See *id.* (discussing Japan's ranking).

370. See *id.* (discussing Germany's ranking).

371. RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 352 (3d ed. 1991) [hereinafter KIRK, *ROOTS*] (discussing Montesquieu's theory of law).

372. See generally Clyde W. Summers, *Comparative Perspectives* [hereinafter Summers, *Perspectives*], in *LABOR LAW AND BUSINESS CHANGE: THEORETICAL AND TRANS-*

these differences that determine each nation's approach to employee involvement.

As its statutory basis suggests, German codetermination reflects a political bargain between labor and capital.<sup>373</sup> This bargain has several dimensions. In an earlier era, when the German economy was capital-poor, codetermination represented a means of encouraging workers to invest in firm-specific human capital despite comparatively low wages.<sup>374</sup> At present, codetermination reflects a political bargain in which employees' pensions are not well-funded, but employees have some voice in corporate governance.<sup>375</sup>

In more general terms, Germany has used codetermination to reduce labor conflict and prevent worker revolts.<sup>376</sup> As such, it was not intended to produce improved employee attitudes or greater productivity, but rather to redistribute power within firms, putting labor on a more equal footing with managers and shareholders.<sup>377</sup> This was the price German firms paid for labor peace. They were willing to do so because even under codetermination, stockholders are likely to prevail if push comes to shove and, even more importantly, codetermination exists in the context of laws that restrict strikes and other forms of labor activism.<sup>378</sup> The bargain thus struck is maintainable, despite its apparent economic problems, because of the choice of law rule that puts physical presence ahead of statutory domicile and the European Union harmonization processes. These factors stifle the state competition for corporate charters that result in shareholder value-maximizing rules.<sup>379</sup>

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ACTIONAL PERSPECTIVES 139 (Samuel Estreicher & Daniel G. Collins eds., 1988) [hereinafter *LABOR LAW AND BUSINESS CHANGE*] (comparing how different labor law systems deal with employment relations problems arising out of major changes in enterprises). The following discussion focuses on the distinction between Germany and the United States mainly because the former's system of industrial relations is much more heavily a creature of statute than is that of Japan.

373. See generally ROE, *supra* note 366, at 213-15 (discussing German codetermination).

374. See *id.* at 215 (discussing codetermination as means of encouraging workers to invest in firm-specific human capital).

375. See *id.* at 214-15 (discussing codetermination as political bargain).

376. See *id.* at 215 (discussing codetermination as means to reduce labor conflicts and prevent worker revolts).

377. See COTTON, *supra* note 14, at 114-15 (discussing codetermination as power redistribution tool); HOPT, *supra* note 350, at 211 (same).

378. See Summers, *Perspectives*, *supra* note 372, at 147 (explaining that German works councils are barred by law from striking or engaging in other forms of economic action).

379. See Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2031 n.30 (1993) [hereinafter Romano, *A Cautionary Note*] (stating that both continental Europe corporate choice of law rule and European's corporation code harmonization process stifle competition for corporate charters among nations); see also HOPT, *supra* note 350, at 206 (stating that changing corporate seats to escape codetermination would only be considered in most dramatic circumstances). In an important contribution to this literature, Bill Carney has characterized codetermination as a species of rent-seeking by labor



United States labor law also can be viewed as a political bargain, which has been struck in ways radically different from the German model on almost every point relevant to codetermination.<sup>380</sup> To be sure, there was a moment in American history in which the bargain nearly went towards the German model. In the New Deal years prior to the adoption of the National Labor Relations Act (NLRA),<sup>381</sup> President Roosevelt expressed the hope that there would develop "a kind of works council in industry in which all groups of employees, whatever may be their choice of organization or form of representation, may participate in joint conferences with their employers."<sup>382</sup> Despite this presidential endorsement, the United States achieved labor peace through general welfare laws and labor legislation that emphasized collective bargaining.<sup>383</sup> Indeed, the NLRA's drafters' refusal to provide for works councils or other forms of employee representation presumably resulted in no small measure from the pronounced union preference for collective bargaining.<sup>384</sup>

In any event, even if changes in U.S. politics now permitted us to replicate the German bargain, doing so would not be enough to make codetermination viable here. Fukuyama treats codetermination as being part of a larger set of social and cultural patterns.<sup>385</sup> Several factors he identifies are particularly relevant to the codetermination phenomenon. First, German firms and workers have preserved much of the cultural heritage that descends from the medieval guilds.<sup>386</sup> Many traditional indus-

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interest groups. See William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 309-11 (1997) [hereinafter Carney, *The Political Economy*] (explaining that rent-seeking labor interest groups seek special interest legislation in states where few foreign corporations are incorporated). Carney argues that this and other special interest legislative provisions are more likely to appear in European than in American law because of barriers to migration (formerly tariffs and presently the real seat conflicts of law rule) that shield special interest group legislation from market forces. See *id.* at 312 (explaining that large costs of European firm migration provide considerable room for interest groups to seek rents from local corporations and their investors).

380. See Summers, *Perspectives*, *supra* note 372, at 147-49 (explaining how German labor law differs from that of United States); see also ROE, *supra* note 366, at 210, 216 (stating that German labor law has roots in Germany's nondemocratic past).

381. 29 U.S.C. §§ 151-169 (1994).

382. David Brody, *Workplace Contractualism in Comparative Perspective*, in *INDUSTRIAL DEMOCRACY IN AMERICA*, *supra* note 171, at 176, 192.

383. See KOCHAN ET AL., *supra* note 15, at 24-25 (explaining American policy choice of collective bargaining as means to labor peace).

384. Although participatory management is often regarded as novel and derived from Japanese roots, it in fact goes back to turn of the century United States labor practices, where it was routinely used as an anti-union weapon, no doubt prompting labor's preference for collective bargaining. See HOGLER & GRENIER, *supra* note 212, at 2-5. See generally KOCHAN ET AL., *supra* note 15, at 25-27 (describing centrality of collective bargaining to New Deal framework).

385. See FUKUYAMA, TRUST, *supra* note 333, at 217-18 (explaining how codetermination arose out of German intellectual climate).

386. See *id.* at 245-52 (noting guild influences on German workplace).

trial relations patterns and expectations formed in the guild system still survive in the German workplace, most of which feature a strongly communitarian and egalitarian streak.<sup>387</sup> Second, Fukuyama contends that the willingness of German managers to trust workers with significant responsibilities, including governance duties, is closely related to the high skill level of those workers and, consequently, to the highly developed system of vocational and industrial training provided by the German educational and apprentice systems.<sup>388</sup> Those systems also have an important socialization function, of course, which helps promote workplace solidarity.<sup>389</sup> Thus, one simply cannot selectively choose certain aspects of the German culture and law to be transplanted to the United States.

Nevertheless, let us assume that the United States adopted some form of government-mandated employee involvement. Would doing so promote trust between workers and managers? I do not believe so, because I believe that the source of workplace distrust is not the tradition of scientific management, as Fukuyama asserts, but rather is located far deeper within the culture.

By its very nature, trust implies vulnerability. If I trust you to perform as per our agreement, I am by definition voluntarily assuming the risk of nonperformance. Trust may therefore be defined as "the willingness of one person to increase his or her vulnerability to the actions of another person whose behavior he or she could not control."<sup>390</sup> Assuming I am risk averse, why should I be willing to risk uncompensated loss? Put another way, in what social contexts and under what conditions is trust most likely to arise?<sup>391</sup>

Trust is essentially social and normative, rather than individual and calculative.<sup>392</sup> It arises out of a set of shared background assumptions and norms.<sup>393</sup> As Fukuyama acknowledges, trust derives from shared values

387. *See id.* (noting that guild influences can still be found in German workplace).

388. *See id.* at 237 (discussing high skill level of German workers with respect to German educational and apprentice systems).

389. *See id.* at 238 (discussing socialization function of education and apprenticeships).

390. Larue Tone Hosmer, *Trust: The Connecting Link Between Organizational Theory and Philosophical Ethics*, 20 ACAD. MGMT. REV. 379, 383 (1995) (citing Dale E. Zand, *Trust and Managerial Problem Solving*, 17 ADMIN. SCI. Q. 229 (1972) (defining trust)).

391. For ease of exposition, I treat the problem of interpersonal trust as a two-state model: either *A* trusts *B*, or *A* does not trust *B*. In fact, however, there are degrees of trust; in particular, the range of domains over which one trusts another tends to vary. One might trust a parent over a wide range of conduct, while trusting a distant relative over a smaller range of behavior. Strangers would be trusted over an even smaller range of conduct. *See* Karen Jones, *Trust as an Affective Attitude*, 107 ETHICS 4, 7 (1996) (explaining different degrees of trust).

392. *See* Hosmer, *supra* note 390, at 389 (arguing that trust is social and normative).

393. *See id.* (arguing that trust stems from norms and assumptions).

and, accordingly, is most likely to arise in homogeneous groups.<sup>394</sup> Robert Ellickson's work on the role of social norms in constraining behavior assumes that such norms arise in close-knit groups, but is agnostic as to whether such norms emerge in other settings.<sup>395</sup> Other scholars put the case even more strongly. According to Donald McCloskey, for example, the importance of trust to market exchange explains why members of the same ethnic group can deal so profitably with one another.<sup>396</sup>

Close-knit groups have several features that promote trust within them. Shared values, which are critical to formation of trust, are one such feature. J. Budziszewski makes this point in the course of critiquing communitarian political theories.<sup>397</sup> He observes that because the polity is a community of communities, a strategic mutual accommodation can be reached only by those sub-communities whose value systems share some common ground.<sup>398</sup> "For instance Catholics, Orthodox, evangelical Protestants, and religious Jews might be able to reach such an accommodation."<sup>399</sup> Generalizing from Budziszewski's example, we infer that shared religious values are important for the development of trust among persons.<sup>400</sup> Virtue is in the first instance an adaptive response to the instinctive human recognition of (and need for) a transcendent moral order codified in a body of natural law.<sup>401</sup> People are most likely to act virtuously when they believe in an external power, higher and more permanent than the state, which is aware of their shortcomings and will punish them in the next life even if they escape retribution in this life.<sup>402</sup>

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394. See FUKUYAMA, *TRUST*, *supra* note 333, at 252-53 (explaining presence of trust in homogenous societies, such as Germany and Japan). Even within a homogenous group, individual interests are likely to vary and conflict. If nothing else, the basic economic principle of scarcity suggests a certain amount of intra-group competition for scarce resources. These conflicts inevitably become even more pronounced in the absence of familial or tribal ties.

395. See ELLICKSON, *supra* note 314, at 184 (noting proposition that "members of close-knit groups develop workaday substantive norms").

396. See Donald McCloskey, *Bourgeois Virtue*, AM. SCHOLAR, Spring 1994, at 177, 183-84 (explaining how trust enables members of same ethnic groups to deal profitably with each other).

397. See J. Budziszewski, *The Problem with Communitarianism*, FIRST THINGS, Mar. 1995, at 22, 26 [hereinafter Budziszewski, *Communitarianism*] (noting that shared values strengthen communities).

398. See *id.* ("First, any 'communitarianism' feasible for the polity as a whole could be reached only by strategic mutual accommodation; second, it could be reached only among those communities whose stories were sufficiently related for them to find some common ground.").

399. *Id.*

400. But see Rafael La Porta et al., *Trust in Large Organizations* (National Bureau of Economics, Research Working Paper No. 5864) (Dec. 1996) (stating that "we find a strong negative association between trust and the dominance of a strong hierarchical religion in a country, most notably Catholicism").

401. See PAUL JOHNSON, *THE QUEST FOR GOD* 6-17 (1996) (providing general discussion on human instinct for faith).

402. See *Proverbs* 1:7 (stating that "fear of the Lord is the beginning of knowledge").

Close-knit groups also have several other advantages. Although the old adage opines “familiarity breeds contempt,” personal proximity to others in fact positively affects behavior.<sup>403</sup> As people become closer, their behavior tends to improve. Virtue is thus inculcated not only through religion, but also through participation in a variety of voluntary communities (churches, schools, social clubs, etc.). As James Q. Wilson observed, “something in us makes it all but impossible to justify our acts as mere self-interest whenever those acts are seen by others as violating a moral principle.”<sup>404</sup> Rather, “[w]e want our actions to be seen by others—and by ourselves—as arising out of appropriate motives.”<sup>405</sup> Voluntary communities strengthen this instinct in several ways. First, they provide a network of reputational and other social sanctions that shape incentives. Because membership in close-knit groups satisfies the human need to belong, the threat of expulsion gives the group a strong sanction by which to enforce compliance with group norms. Because close-knit groups involve a continuing relationship, the threat of punishment in future interactions deters the sort of cheating that is possible in one-time transactions.<sup>406</sup> Second, because people care about how they are perceived by those close to them, communal life provides a cloud of witnesses whose good opinion we value. We hesitate to disappoint those people and thus strive to comport ourselves in accordance with communal norms. Third and finally, there is a transaction costs economics explanation for the importance of closeness in trust relationships. Close-knit groups know a lot about one another, which reduces monitoring costs and thus further encourages compliance with group norms.<sup>407</sup> Therefore, members of close-knit groups tend to internalize group norms, which allows members of the group to trust one another in ways they would not be willing to risk when dealing with outsiders.

Under modern working conditions, workers and senior managers can hardly be described as close knit. In particular, two factors seem especially significant with respect to the erosion of trust in U.S. workplaces—diversity and the loss of shared values formerly held by both managers and workers. As to the former, U.S. workers are required to function in increasingly diverse work forces. Without intending to get into the current public policy debate over affirmative action, I note that the importance of

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403. See Naughton, *Participation in the Organization*, *supra* note 42, at 929 (discussing proximity thesis and citing belief in papal writings that worker participation enables workers to grow in solidarity with management).

404. James Q. Wilson, *What is Moral, and How Do We Know It?*, 95 COMMENTARY 37, 39 (1993).

405. *Id.*

406. See ELLICKSON, *supra* note 314, at 179 (discussing continuing relationships of close-knit groups). But see La Porta et al., *supra* note 400 (noting some experimental evidence that “people expect certain fair or cooperative behavior of their opponents even when they do not expect to see them again”).

407. See ELLICKSON, *supra* note 314, at 180-81 (noting reduction of monitoring costs in close-knit groups).

ethnic and similar ties to the development of trust within a group has demonstrable consequences for the viability of participatory management in a diverse workplace. Even within communitarian societies, egalitarian relationships are often limited to homogeneous cultural groups.<sup>408</sup> In heterogeneous groups, mandated due process rights tend to substitute for spontaneous and genuine trust.<sup>409</sup> This conclusion is supported by empirical evidence that worker participation in corporate decisionmaking is most effective in homogeneous work forces.<sup>410</sup> The success of the well-known worker cooperatives at Mondragon in Spain, for example, is attributed to the ethnic and cultural homogeneity of the Basque workforce.<sup>411</sup> Consider also the observation that many Japanese-owned U.S. manufacturing firms, "particularly in electronics, have adopted very few Japanese production methods. Rather, they utilize paternalistic and low-wage employment strategies with little evidence of any sophisticated work practices."<sup>412</sup> Practices found in the homogenous Japanese society apparently have not been transplanted to the more diverse U.S. workplace.

As to the latter factor, the loss of shared values between workers and managers, I believe it is yet another consequence of Lasch's Revolt of the Elites. Seymour Martin Lipset argued that U.S. society incorporates certain core "values, culturally embedded and persistent across the barriers of socioeconomic class, ethnicity, race, religious belief, and political ideology, [that] stress individual achievement and egalitarianism in social relationships."<sup>413</sup> If so, one might infer that German-style egalitarian work practices might be successful in the U.S. There are two counter-arguments, however, against drawing such an inference.

First, there is an inherent tension between the identified values of egalitarianism and individual achievement. Individualism tends to predominate with respect to decisions affecting personal matters, while deference to hierarchy tends to predominate with respect to group decisions.<sup>414</sup> Taken together, these push/pull forces bode ill for the viability of participatory management. On the one hand, Americans' individualistic streak is inconsistent with the cooperative values necessary for participatory management to succeed. On the other hand, the tendency to defer to hierarchical decisionmaking in group settings is inconsistent with

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408. See FUKUYAMA, *TRUST*, *supra* note 333, at 252.

409. See *id.* (comparing due process rights to trust, and stating that there is formal equality and due process instead of trust in heterogeneous societies).

410. See Drago, *supra* note 176, at 59 (providing statistical evidence that worker participation in corporate decisionmaking is most effective in homogenous groups).

411. See Jacqueline Bhabha, *The Right to Community*, 64 U. CHI. L. REV. 1117, 1126 (1998) (noting success of cooperatives at Mondragon).

412. KOCHAN ET AL., *supra* note 15, at xvii.

413. Seymour Martin Lipset & Marcella Ridlen Ray, *Technology, Work, and Social Change*, 17 J. LAB. RES. 613, 623 (1996).

414. See WITTE, *supra* note 162, at 41 (comparing individualism to hierarchical deference in decisions).

giving substance to the democratic rhetoric of participatory management. The evidence recounted above, which suggests that both workers and managers often resist employee participation, thus seems to be less a problem of economic imperfections in the labor market and more a question of strongly ingrained cultural biases. As such, it is unlikely that cultural impediments of this sort would readily respond to surface changes in legal rules.<sup>415</sup>

Second, query whether Lipset is correct in asserting that these values persist across the class boundaries between workers and managers. Status-based differentials within corporate hierarchies have been widely criticized.<sup>416</sup> Such differentials presumably impede the development of trust between managers and workers, which is presumably one reason proposed participatory management mandates often include concomitant proposals to flatten wage structures.<sup>417</sup> It is important that all employees, management and labor included, have common goals, including upward mobility, achievable status and belonging to the same team.<sup>418</sup> But how can they achieve mutual interdependence if they are not part of a community of shared values? As Christopher Lasch explains:

[T]he new elites, the professional classes in particular, regard the masses with mingled scorn and apprehension. In the United States, "Middle America"—a term that has both geographical and social implications—has come to symbolize everything that stands in the way of progress: "family values," mindless patriotism, religious fundamentalism, racism, homophobia, retrograde views of women. Middle Americans, as they appear to the makers of educated opinion, are hopelessly shabby, unfashionable, and provincial, ill informed about changes in taste or intellectual trends, addicted to trashy novels of romance and adventure, and stupefied by prolonged exposure to television. They are at once absurd and vaguely menacing . . . .<sup>419</sup>

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415. See *id.* at 2 ("[M]eaningful workers' participation will be extremely difficult to achieve, given the widely held American faith in meritocracy . . ."). Marleen O'Connor argues that legal reforms can produce the requisite cultural changes. See O'Connor, *Human Capital Era*, *supra* note 17, at 944 (opining that current law "represses the expression of altruism, erodes the sense of community in the firm, and sanctions the expropriation of workers' firm-specific investments"). Query, however, whether legal reform could precede cultural change, especially in the teeth of rent-seeking by special interest groups.

416. See, e.g., Levine, *supra* note 21, at 192 (critiquing disparate treatment based on status).

417. See *id.* at 192-93 (noting that although hierarchical firms with wide wage differentials will be more profitable than participatory firms with minimal pay differentials, they are less socially desirable).

418. See, e.g., NOVAK, *BUSINESS AS A CALLING*, *supra* note 271, at 125-28 (stressing need for community within work environment).

419. LASCH, *supra* note 84, at 28-29.

Given the importance of shared ethnicity and/or religious beliefs to the development of trust, Lasch's comments on the elite class's attitude towards religion are especially instructive: "A skeptical, iconoclastic state of mind is one of the distinguishing characteristics of the knowledge classes. . . . The elites' attitude to religion ranges from indifference to active hostility."<sup>420</sup>

In sum, trust has considerable social value. In some societies, most notably Japan and Germany, trust between managers and workers appears to be a component of economic success. There is room to doubt, however, whether their high levels of trust are the consequence of their systems of employee involvement. There is far greater reason to doubt that government-mandated employee involvement would lead to instrumentally beneficial trust in U.S. workplaces.

## 2. *The Virtue of Trustworthiness in the Workplace*

My arguments regarding the effect of participatory management on manager-worker trust thus far have sounded in purely instrumental terms. Trust has undeniable instrumental value, but from a moral perspective, trust must be distinguished from trustworthiness. Trust *per se* is not a virtue, but trustworthiness is.<sup>421</sup> "The Lord abhors dishonest scales, but accurate weights are his delight."<sup>422</sup> We are called to be trustworthy in all things, even if we are sometimes (or even often) disappointed by others in whom we trusted. "Wealth is worthless in the day of wrath, but righteousness delivers from death."<sup>423</sup>

Precisely because trustworthiness is a virtue, the question arises—can we assume virtuous behavior by the masses of a secular society?: "It is usual to praise a pagan or Christian virtue and then complain how much we moderns lack it. Shamefully we bourgeois are neither saints nor heroes. The age is one of mere iron—or aluminum or plastic—not pagan gold or Christian silver."<sup>424</sup> No realistic social order can assume "heroic or even consistently virtuous behavior" by its citizens.<sup>425</sup> Instead, because all have sinned,<sup>426</sup> a realistic social order must be designed around principles that fall short of ideal virtues.<sup>427</sup> Legal rules and predictions about human behavior must assume the fallen state of humans.

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420. *Id.* at 215.

421. See Hardin, *supra* note 330, at 28-29 (distinguishing between trust and trustworthiness). There are empirical questions here: Do employees who participate in corporate decisionmaking become more trustworthy? Do firms that foster employee involvement become more trustworthy? The connection between the two appears to be tenuous, at best.

422. *Proverbs* 11:1.

423. *Id.* at 11:4.

424. McCloskey, *supra* note 396, at 178.

425. NOVAK, BUSINESS AS A CALLING, *supra* note 271, at 28.

426. See *Romans* 6:12.

427. See NOVAK, BUSINESS AS A CALLING, *supra* note 271, at 28.

Assume *arguendo* that public policy can make fallen people more trustworthy. As the number of honorable and trustworthy people in society rises, the gains of cheating also rise.<sup>428</sup> If most people are trustworthy most of the time, transactions will be premised on trust, which makes untrustworthy behavior even more profitable precisely because it permits the dishonest to take advantage of their naively trusting business associates. A public policy of promoting intra-firm trust through employee involvement will therefore require the state to provide a coercive backstop to punish behavior that departs from government-mandated standards of trustworthiness.

The trust-based justification for government-mandated employee involvement thus suffers from a serious internal inconsistency that is ultimately self-defeating. Coercion is an odd way, at best, of promoting either trust or trustworthiness. The nanny state is a poor substitute, at best, for the virtue-inculcating power of faith and voluntary community. We may fear the faceless bureaucrat, but he does not inspire us to virtue. Conduct that rises above the lowest common moral denominator thus cannot be created by state action. Although the state cannot make its citizens virtuous, it can destroy the intermediary institutions that do inculcate virtue— “[c]ommunities can be destroyed from without, but they cannot be created from without; they must be built from within.”<sup>429</sup>

Once we recognize that government-mandated employee involvement programs cannot evade the need for an oppressively high level of state coercion, an even more serious and fundamental objection to such programs emerges. If America is becoming a low-trust society, as Fukuyama contends, it is precisely because of the sort of statism inherent in proposals to mandate employee involvement.<sup>430</sup> The decline in social trust began when the rich set of mediating institutions famously praised by Tocqueville was caught, like the Romans at Cannae, between the nanny state on one side and judicial hijacking of the state’s monopoly on the use of coercive force to advance a hyper-legalistic cult of the autonomous individual on the other.<sup>431</sup> Although I defer full development of this argument until the next section, it should be noted that a natural law argument against government intervention thus has a strong moral/political component.

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428. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 192, at 417 (exemplifying this notion in context of insider trading).

429. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 324 (1995).

430. See Francis Fukuyama, *The Economics of Trust*, NAT’L REV., Aug. 14, 1995, at 42-43 [hereinafter Fukuyama, *Economics*] (contending that America is becoming low-trust society).

431. See, e.g., Peter L. Berger, *Trusting Laws, Trusting Others*, FIRST THINGS, Apr. 1996, at 12, 12-13 (correlating decline of social trust with proliferation of laws); see also EPSTEIN, *supra* note 429, at 323-25 (discussing tendency of state to destroy voluntary communities).



B. *Workplace Democracy*

The Bishops' pastoral letter asserted that economic justice required incorporating "democratic ideals" into the workplace.<sup>432</sup> In making this claim, it partly reflected the strong communitarian streak in Catholic social teaching, which emphasizes participation within communities as an essential component of human dignity.<sup>433</sup> The Bishops' position, however, also appears to reflect the same ideology of participatory democracy that characterizes the secular humanist literature.<sup>434</sup> This ideology opines that democratic organizational structures and self-directed work lead not only to enhanced productivity, but also to a more just organization:

Through both role and process empowerment, [i.e., participatory management] employees gain an increased sense of ownership over their own work processes. As a result they are less inclined to be absent, to be late, to seek transfers, or to provide grudging minimal performances. Empowered workers exercise greater discretion over the character of their own organizational involvement, possess a greater sense of identification with their organizations, and correspondingly work both more productively and with greater personal satisfaction.<sup>435</sup>

Although workplace democracy might take a myriad of forms, my analysis herein focuses on proposals that the United States move towards a variant of the German system of codetermination. Due to the extensive German (and to a lesser extent the Scandinavian and Dutch) experience with codetermination, it is not only the best developed form of participatory workplace democracy, but is also the one about which the most is known. In this context, a focus on codetermination is especially appropriate because it is the form of industrial democracy with which Catholic social teaching has been especially concerned.<sup>436</sup>

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432. See BISHOPS' LETTER, *supra* note 39, ¶ 298, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, app. (noting that economic justice requires incorporating democratic ideals in workplace).

433. See Kenneth R. Himes, *Rights of Entitlement: A Roman Catholic Perspective*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 507, 523 (1997) (emphasizing participation within communities as essential in human dignity).

434. The relevant papal encyclicals are fairly circumspect in their treatment of industrial democracy, largely limiting it to trade unionism, while recognizing the need for authoritative direction within the business enterprise. See, e.g., MATER ET MAGISTRA, *supra* note 158, ¶ 92, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 98 (acknowledging that firms must "maintain a necessary and efficient unity of direction").

435. Gandz & Bird, *supra* note 177, at 385 (citations omitted); see THE CUOMO COMMISSION ON TRADE AND COMPETITIVENESS, THE CUOMO COMMISSION REPORT: A NEW AMERICAN FORMULA FOR A STRONG ECONOMY 200 (1988) (stating that "[w]hen workers participate in major decisions, our enterprises produce not only goods, but citizens").

436. See Lord Wedderburn of Charlton, *Companies and Employees: Common Law or Social Dimension*, 109 LAW Q. REV. 220, 230 (1993) (observing that political sup-

The core intuition of my critique of promandate normative claims based on notions of workplace democracy is that the moral norms of a democratic polity do not require that all of its components adopt participatory democracy as their internal governance mechanism. Indeed, to the contrary, the moral norms of our democratic polity forbid the government from imposing internal governance schemes, democratic or not, on other segments of society.

A corporation is not a New England town meeting.<sup>437</sup> Rather, it is one of the most hierarchical of our social institutions. Its principal democratic aspect is the shareholders' right to elect directors and vote on a handful of other decisions. Thereafter, democracy goes out the window. In theory, the firm is managed by its directors, limited only by their fiduciary duties. In practice, it is usually a bureaucratic hierarchy commanded by a strong chief executive or, perhaps, an oligarchy comprised of its senior officers.

Hierarchy has become a dirty word in the academic circles out of which secular humanist literature comes. As the radical critique of the modern corporate structure goes, "Bosses exploit workers, and hierarchy is the organizational device by which this result is accomplished."<sup>438</sup> As I have demonstrated in detail elsewhere, however, hierarchy benefits all of the corporation's constituencies, including its employees.<sup>439</sup> Hierarchy serves two basic functions—monitoring workers to ensure accountability and the efficient transmission of information within the firm.<sup>440</sup>

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port for codetermination within European Union "can as easily be seen as part of the tradition of Catholic social reformism as of any socialist tendency").

437. Cf. *In re TW Servs., Inc. Shareholders Litig.*, Civ.A.No. 10427, 1989 WL 20290, at \*12 (Del. Ch. Mar. 2, 1989):

Questions of this type call upon one to ask, what is our model of corporate governance? "Shareholder democracy" is an appealing phrase, and the notion of shareholders as the ultimate voting constituency of the board has obvious pertinence, but that phrase would not constitute the only element in a well articulated model. While corporate democracy is a pertinent concept, a corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation . . . .

*Id.*

438. WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 321, at 207. See, e.g., Hyde, *supra* note 166, at 180 n.66 (stating that "[h]ierarchies don't arise just because they are efficient and may perpetuate themselves long after they have ceased to be efficient at all, because people in power enjoy having power and do not give it up willingly").

439. See Bainbridge, *Participatory Management*, *supra* note 5, at 661-73 (discussing importance of centralized decisionmaking process and rise of manager-controlled corporate hierarchies as dominant form of business organization); see also Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (discussing benefits to all of hierarchical organization).

440. See Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (noting and explaining functions of hierarchies in firms). As I have demonstrated elsewhere, bureaucratic hierarchies sometimes fail to carry out these tasks efficiently. I have posited that in such situations, participatory management may be a more efficient

Accountability is at issue because true participatory democracy (whether in the workplace or elsewhere) requires a great deal of virtue on the voters' part. Virtuous citizens will pursue the collective interest of the polity even when doing so conflicts with their personal self-interest. In economic terms, the virtuous citizen refrains from using his voting rights as a rent-seeking mechanism. As we have seen, however, no realistic social order can assume "heroic or even consistently virtuous behavior" by its citizens.<sup>441</sup> A realistic social order, therefore, must be designed around principles that fall short of our ideals: "Any social order that intends to endure must be based on a certain realism about human beings and, therefore, on a theory of sin and a praxis for dealing with it."<sup>442</sup>

In the employment arena, such a "theory of sin" is provided by the economic concept of agency costs.<sup>443</sup> Agency costs are defined as the sum of the monitoring and bonding costs, plus any residual loss incurred, to prevent shirking by agents.<sup>444</sup> In turn, shirking is defined to include any action by a member of a production team that diverges from the interests of the team as a whole.<sup>445</sup> As such, shirking includes not only culpable cheating, but also negligence, oversight, incapacity and even honest mistakes.<sup>446</sup> In other words, shirking is simply the inevitable consequence of bounded rationality and opportunism within agency relationships.

A sole proprietorship with no agents will internalize all the costs of shirking because the proprietor's optimal trade-off between labor and leisure is, by definition, the same as the firm's optimal trade-off. Agents of a firm, however, will not internalize all of the costs of shirking; the principal reaps part of the value of hard work by the agent, but the agent receives all of the value of shirking. Although agents *ex post* have strong incentives to shirk, *ex ante* they have equally strong incentives to agree to an employment contract containing terms designed to prevent shirking.<sup>447</sup>

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way of accomplishing these two goals. See Bainbridge, *Participatory Management*, *supra* note 5, at 709-10 (noting that participatory management has purely instrumental explanation having little to do with notions of workplace democracy and that this explanation of participatory management's economic function argues against imposing mandatory employee involvement).

441. MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION 28 (1990) [hereinafter NOVAK, THEOLOGY OF THE CORPORATION].

442. *Id.*

443. See Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 304 (1983) (discussing agency costs).

444. See *id.* (defining agency costs).

445. See Dooley, *Two Models*, *supra* note 322, at 645 (defining shirking as temptation to pursue self-interest at expense of others).

446. See *id.* (explaining shirking as embracing all failures to keep previous commitments, whether such failures result from culpable cheating, negligence, oversight or simple incapacity).

447. See Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 781-83, 794 (1972) (arguing that firm exists to decrease monitoring costs). See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership*

Bounded rationality, however, precludes firms and agents from entering into the complete contract necessary to prevent shirking by the latter. Agents therefore will agree to some system of *ex post* governance, some mechanism for detecting and punishing shirking. Accordingly, an essential economic function of hierarchical management is to monitor the various inputs into the team effort—management meters the marginal productivity of each team member and then takes steps to reduce shirking.<sup>448</sup>

Because hierarchy also promotes efficient transmission of information within large organizations, it would still be necessary even in a firm with uniformly virtuous employees. Even such a firm could not rely on democratic principles once it grew beyond a relatively small size. Collective action problems necessarily preclude the use of participatory democracy in large firms, as they preclude the United States from being run as though it were a New England town meeting. Thus, workplace democracy in such a firm necessarily takes on representative forms, with substantial hierarchy, such as the supervisory board found in the German codetermination system. As noted above, however, the German system is founded on political, rather than economic, considerations. As I have explained in detail elsewhere,<sup>449</sup> there are sound theoretical reasons for believing that worker representation on boards of directors is highly inefficient, and there is fairly persuasive empirical verification of that hypothesis.<sup>450</sup> I also have elsewhere demonstrated that government-mandated codetermination, including both the supervisory board and the works council, cannot be justified on economic grounds.<sup>451</sup>

Although I shall not rehash the economic argument here in detail, it is worth noting that my conclusion is buttressed by considerable evidence that nominally equal participation in decisionmaking does not equate to equal influence.<sup>452</sup> Even in systems where fairly substantial influence is wielded by employee representatives, moreover, there is little impact on the represented employees.<sup>453</sup> A cross-cultural study of employee involvement found that although *de jure* participation varies across different countries, workers generally felt they had little influence irrespective of their nation's legal structure.<sup>454</sup>

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*Structure*, 3 J. FIN. ECON. 305 (1976) (noting that contractual relations are essence of firm).

448. See Alchian & Demsetz, *supra* note 447, at 794.

449. See generally Bainbridge, *Participatory Management*, *supra* note 5.

450. See *id.* at 661-64 (discussing centralized management).

451. See *id.* at 709-18 (considering ill effects of legislation mandating joint management-labor committees).

452. See COTTON, *supra* note 14, at 139 (discussing integration of workers' interests into organized decisionmaking in Western Europe).

453. See *id.* at 140 (demonstrating symbolic as opposed to practical value of representative participation).

454. See *id.* at 135 (examining study of participation practices in 12 European countries).

My point is illustrated by the German and Japanese systems, whose purported egalitarianism tends to disappear upon close examination.<sup>455</sup> Recall that German codetermination was intended to preserve labor peace, but also was designed to ensure that shareholders would have a slight (but critical) superiority on the supervisory board.<sup>456</sup> In Japan, economic outcomes are likewise what drive participatory management, not concern for industrial democracy.<sup>457</sup> As a Japanese scholar explained, the quality circle-like features of Japanese firms are “not intended to increase workers’ autonomy but [only] to help them find out problems in the production line so that no defective goods will be produced.”<sup>458</sup> Japanese quality circles, therefore, “very often take on a coercive aspect with top-down control continuing to dominate the small group environment.”<sup>459</sup>

Why then do arguments sounding in workplace democracy persist in promandate literature? Recall that much of that literature is fairly characterized as “rights talk.” It is in the present context that the validity of that charge is most readily apparent. There is a strong tinge of left-liberal political ideology in the promandate proposals: “The leftist vision [of participatory management] adopts socialist rhetoric and presents cooperation as a new weapon in the struggle for industrial democracy and workers’ rights.”<sup>460</sup> Participatory management thus becomes a mere extension of class warfare, designed to serve as the entering wedge that will lead to “genuine workplace democracy.”<sup>461</sup> One routinely encounters this “vision” in the participatory management area. Other than a handful of old-line union sympathizers, who see employee involvement as a threat to unions, most academic commentary on participatory management is “inspired by New Left visions of participatory democracy, in which, as the

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455. See Bainbridge, *Community and Statism*, *supra* note 191, at 879-80 (“[T]he stakeholderists commonly point to Japan and Germany, and assert that their firms are more efficient . . . precisely because those nations mandate employee involvement . . . . On close examination, moreover, the evidence falls far short of making a compelling case for the progressive communitarian account.”).

456. See *id.* at 880 (“German-style codetermination has been found to have the least impact on productivity and employee attitudes of any participatory management scheme.”). See generally Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 147-49 (1997) (outlining Germany’s established history of employee involvement programs).

457. See HOGLER & GRENIER, *supra* note 212, at 103 (“In Japan, where consensus decisionmaking and joint consultation are central to the industrial relations system, the issue of democratization is clearly secondary to economic outcomes.”).

458. Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor’s Challenge*, 12 INDUS. REL. L.J. 233, 255 n.99 (1990) (quoting Haruo Shimada as quoted in John Hoerr, *The Payoff From Teamwork*, BUS. WK., July 10, 1989, at 56, 61); see COTTON, *supra* note 14, at 78 (noting that quality circles are not intended to democratize workplace, but simply to provide practical mechanism for addressing and decentralizing quality control issues).

459. HOGLER & GRENIER, *supra* note 212, at 103-04.

460. McLeod, *supra* note 458, at 238.

461. *Id.* at 262.

critical legal scholar Karl Klare has put it, 'the struggle [is] to make the workplace a realm of free self-activity and expression.'<sup>462</sup>

My point is not that ideological scholarship is inappropriate, but only that laying bare the ideological underpinnings of promandate scholarship permits us to evaluate their claims more fully. Would government-mandated employee involvement promote democratic and efficient values widely shared within society or only the values of a sub-set of left-liberalism? Despite their democratic rhetoric, might the promandate argument be inconsistent with the moral norms of a democratic polity?

Despite its democratic rhetoric, Catholic social teaching, as preached by the Bishops' pastoral letter, has a strong statist slant.<sup>463</sup> Although they do not support nationalizing industry, the Bishops' support of regulation designed to protect employees and encourage their participation in corporate governance differs only in degree, and not in kind, from collectivism. Indeed, Milton Friedman complained that "the collectivist moral strain that pervades the [Bishops' pastoral letter] is repellant."<sup>464</sup> Although Friedman may have gone a bit too far, it is fair to assert that the Bishops produced a document that sounded a lot like "the platforms of European social democratic parties."<sup>465</sup> Virtually every recommendation in the text, including those relating to participatory management, contemplated some form of government intervention.<sup>466</sup> Likewise, Pope John Paul II's encyclicals have a strong statist flavor. Although he was sharply

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462. Brody, *supra* note 382, at 176, 177 (quoting Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 338-39 (1978)); cf. Stone, *supra* note 340, at 170 (discussing labor-management cooperation). Stone stated that:

[L]abor-management cooperation is more of an ideology than a meaningful description of employee participation. It is an ideology that evokes a vision of the good—a world where labor and management work together to improve productivity, restore American competitiveness, and increase social wealth, all the while sharing the bounty fairly and equitably.

*Id.*; see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 897-99 (1994) (discussing workplace democracy); McLeod, *supra* note 458, at 283 (contending that current participatory management programs are management-oriented and arguing that unions should pursue alternative forms more favorable to labor); see also Joel Rogers, *Reforming U.S. Labor Relations*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 211, at 15, 19-23 (making both productivity and equality arguments).

463. See Milton Friedman, *Good Ends, Bad Means*, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, at 99.

464. *Id.*

465. Robert Benne, *The Bishops' Letter—A Protestant Reading*, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, at 76, 79.

466. See BISHOPS' LETTER, *supra* note 39, ¶ 116, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, app. ("By collaborating with those national governments that serve their citizens justly and with intergovernmental agencies, these corporations can contribute to overcoming the desperate plight of many persons throughout the world.")

critical of Marxism, the Pope did not disavow collectivist solutions to economic problems. *Laborem Exercens* specifically posits that "one cannot exclude the socialization, in suitable conditions, of certain means of production."<sup>467</sup>

Nothing in the moral norms of our democratic polity requires the use of the state's monopoly on the use of coercive force to impose workplace democracy. Life in a democratic polity does not require that all social institutions be governed democratically. Corporations, for instance, are not typically democratic; by their very nature, they are fundamentally executive institutions. Democratic societies tolerate a host of similarly hierarchical institutions, not least of which is the Catholic Church.<sup>468</sup> Although the Bishops presumably concede the hierarchical nature of Catholicism, presumably they would not concede that the Church deleteriously affects human dignity.

In fact, the moral norms of our democratic polity oppose government imposition of mandatory employee involvement. The relevant moral/political principle is sphere sovereignty, which posits that social institutions, including both the state and the corporation, are organized horizontally, that none is subordinated to the others and that each has a sphere of authority governed by its own ordering principles.<sup>469</sup> Expansion of any social institution beyond its proper sphere necessarily results in social disorder and opens the door to tyranny.

From a perspective founded on sphere sovereignty, proposals for government-mandated participatory management are troubling because they threaten to invoke the state's monopoly on the use of coercive force in ways that deny the right of humankind to order society, whether acting individually or collectively through voluntary associations.<sup>470</sup> In a society

467. *LABOREM EXERCENS*, *supra* note 123, ¶ 14, *reprinted in* PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 372.

468. For a discussion of the view of the Catholic Church regarding the hierarchical ordering of society, see *infra* note 469.

469. See J. Budziszewski, *The Problem with Conservatism*, FIRST THINGS, Apr. 1996, at 38, 42 [hereinafter Budziszewski, *Conservatism*] ("Ordering social institutions horizontally instead of vertically, it says that each has its own domain, its own authority, and its own ruling norm, for instance love in the case of the family and public justice in the case of the state."). Sphere sovereignty is a staple of Protestant political thought. See *id.* ("Sphere subsidiarity is more prominent in Protestant social thought."). Similar conclusions can be drawn from the Catholic principle of subsidiarity. See *id.* ("Subsidiarity, a precept of Catholic social thought, holds that greater and higher social institutions like the state exist just to *help* lesser and subordinate ones like the family."). Unlike sphere sovereignty's horizontal ordering of society, subsidiarity orders society vertically, with the state above "lesser" institutions, such as the corporation. See *id.* (noting Catholics' placement of certain social institutions above others). The state nevertheless transgresses its moral authority when it absorbs or takes away the legitimate authority of lower institutions. See *id.* (stating that "to destroy the lesser institutions, absorb them, or take away their proper functions is" wrong and disturbance of right order).

470. See, e.g., Lodge, *supra* note 141, at 250-51 (describing desirability of "clearer control by the political order").

premised on sphere sovereignty, private property and freedom of contract are important not in their own right, but rather because they provide essential limitations on the power of the state. As Russell Kirk observed, "Freedom and property are closely linked: separate property from private possession, and Leviathan becomes master of all."<sup>471</sup> Sphere sovereignty thus assumes that a limited state is an essential attribute of ordered liberty. Liberty is best preserved if the state's monopoly on the use of coercive force is rarely invoked and, in the main, invoked only to deal with serious moral questions. From this perspective, the trouble with the modern state is not its existence, but its expansion beyond those functions prescribed by custom and convention, which were legitimized by ancient usage into the pervasive nanny state.

Sphere sovereignty and resulting notions of limited government are fully consistent with the natural law tradition. The great natural law scholar Thomas Aquinas, who recognized that positive law could not repress all vices let alone produce all virtues, stated that positive law should not "prohibit every vice from which virtuous men abstain, but only the more serious ones from which the majority can abstain, especially those that harm others and which must be prohibited for human society to survive, such as homicide, theft, and the like."<sup>472</sup>

In sum, subordination of economic institutions to the state poses a grave threat to personal liberty.<sup>473</sup> Thus, resistance of further state encroachments responds to the "notion that the prevailing moral threat in our era may not be the power of the corporations, but the growing power and irresponsibility of the state."<sup>474</sup>

### C. *Protection of Employee Interests*

Central to many proposals mandating employee involvement is the proposition that employees have a right to participate in corporate decisionmaking to protect themselves from oppression by opportunistic managers and shareholders.<sup>475</sup> Pope John Paul II, for example, calls for worker solidarity, including mechanisms for employee participation in firm decisionmaking, as a response to, *inter alia*, "exploitation" of work-

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471. KIRK, CONSERVATIVE MIND, *supra* note 75, at 9.

472. Zuckert, *supra* note 32, at 711 (quoting THOMAS AQUINAS, SUMMA THEOLOGICA I-II, q. 96, art. 2).

473. See, e.g., NOVAK, THEOLOGY OF THE CORPORATION, *supra* note 441, at 34 (stating that "[t]he public interest is best served by an economic system powerful enough to resist and to restrain the political system, for the classic danger to liberal ideals comes far more from the tyranny of the public sector than from the sins of the private sector").

474. *Id.*

475. See Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 137 (1993) [hereinafter Summers, *Employee Voice*] (assuming that voluntary relationships between employer and employee must be regulated to prevent coercion and oppression).



ers.<sup>476</sup> The U.S. Bishops even more explicitly called for “stronger institutional protection,” which included “granting employees greater participation in determining the conditions of work.”<sup>477</sup> This section examines both elements of the Bishops’ claim: (1) that workers need protection from, *inter alia*, managerial and shareholder opportunism and (2) that participatory management is an appropriate and effective means of protecting worker interests.

There is no doubt, to paraphrase a recently popular slogan, that opportunism happens. Labor contracts are subject to moral hazard problems on both sides.<sup>478</sup> Workers shirk, providing less effort than that to which they have agreed. Owners behave opportunistically, providing fewer rewards than promised.

Opportunism occurs because investments in transaction-specific assets create quasi-rents that are subject to expropriation through opportunistic behavior by one of the contracting parties.<sup>479</sup> In the employment setting, the problem is usually framed as one involving breach of implicit contracts pursuant to which employees made investments in firm-specific human capital.<sup>480</sup> Consider an employee who invests considerable time and effort in learning how to do his or her job more effectively. Much of this knowledge will be specific to the firm for which he or she works. The effort and opportunity costs incurred in developing such knowledge constitute an investment in firm-specific human capital upon which the employee can earn a return only so long as he or she remains with that firm.

A rational employee will invest in firm-specific human capital only if rewarded for doing so. An implicit contract thus comes into existence between the employee and the firm. On the one hand, employees promise to become more productive by investing in firm-specific human capital.

476. See CENTESIMUS ANNUS, *supra* note 2, ¶ 8, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 438 (stating injustices inherent within labor contracts).

477. BISHOPS’ LETTER, *supra* note 39, ¶ 300, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, app. Similar claims are wide-spread in the secular humanist literature. See, e.g., RONALD M. GREEN, THE ETHICAL MANAGER 190 (1994) [hereinafter GREEN, ETHICAL MANAGER] (“[B]ut there is another, more direct way of limiting abusive conduct in this area. We could simply require employee participation in decision making about these matters.”); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 302 (1998) (“[E]ven when workers see evidence that the management is not acting in their best interest, there is less they can do about it [than shareholders can].”).

478. See Hausman & McPherson, *supra* note 74, at 684 (describing effect of moral commitments).

479. See Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 298 (1978) (providing formula for computing quasi-rent value of assets and giving example).

480. See Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1006 n.149 (1992) [hereinafter Bainbridge, *Interpreting Statutes*] (citing commentaries on shareholder/stockholder interaction and hostile takeover); see *id.* at 1006-08 (discussing employee-shareholder relationship, employee involvement in firm-specific human capital and vulnerability of shareholders due to implicit rather than explicit contracts).

They bond the performance of that promise by accepting long promotion ladders and compensation schemes that defer much of the return on their investment until the final years of their career. Accepting deferred compensation, in which salary or wages rise with seniority, provides such a bond because the employee will carry out his or her side of the bargain to avoid being terminated before compensation rates rise at the end of his or her career. In return, the firm promises to fulfill its part of the bargain by providing job security so that the employee will be able to collect that deferred compensation.

The implicit nature of the contract in question, by which is meant its lack of legal enforceability, leaves employees vulnerable to opportunistic corporate actions. Because implicit contracts are enforced via moral and market sanctions, rather than legal sanctions, there is no direct remedy for breach of such agreements. An employee could impose a direct market sanction on an opportunistic employer by quitting, but it is the employee's very investment in firm-specific human capital that makes exit a costly remedy.<sup>481</sup> In turn, this allows for expropriation of the quasi-rent created by their investment in such human capital. Recall that the employees' implicit contracts involve delaying part of their compensation until the end of their careers. If the firm fires its workers before the natural end of their careers, replacing them with cheaper, younger workers, or obtains wage or other concessions from the existing workers by threatening to displace them or close the plant, the employees will not receive the full value of the services they provided to the corporation. In effect, a portion of their firm-specific human capital has been appropriated by the firm.

Opportunism can be constrained, but not eliminated, contractually. Bargaining is costly, especially when future contingencies are difficult to predict. Uncertainty, complexity and bounded rationality further combine to ensure that labor contracts will always be incomplete. To say that market solutions are imperfect, however, is not to say that government should intervene. Given the moral arguments in favor of the limited state, reviewed in the prior section, something more than a mere market failure must be shown. Instead, the superiority of a government mandate must be demonstrated on a case-by-case basis to warrant government involvement.

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481. I do not treat investments in firm-specific human capital as a sunk cost problem. First, doing so would ignore the incentive effects of appropriation of the quasi-rents created by firm-specific human capital. Rational actors sink investments only if they expect to receive quasi-rents on those investments. If those rents are subject to appropriation, rational actors will not invest in firm-specific human capital. Thus, the problem can not be assumed away simply by viewing those investments as sunk costs. Second, although investments in firm-specific human capital may be properly viewed as sunk costs from an *ex post* perspective, firm-specific human capital is a current asset that is subject to appropriation. Put another way, the presence of high sunk costs is one of the essential conditions for appropriation of quasi-rents to occur. Third, anecdotal empiricism suggests that refusing to walk away from sunk costs is one of the most common ways in which people systematically depart from the rational actor model.

We may identify two natural law principles that are potentially relevant to government intervention that is designed to prevent the opportunism under consideration. First, the prohibition on doing harm. Second, the right of self-defense.

Most ethical systems recognize a basic prohibition on doing harm. In operationalizing this duty, we are ethically responsible both for our actions and the reasonably foreseeable consequences of our actions.<sup>482</sup> Thus, we must not only refrain from intentionally doing harm to another, but must also seek to rectify the negative consequences of our conduct.<sup>483</sup> There can be little doubt that society recognizes that this moral norm applies to the workplace. Various social norms, in fact, appear to play an important role in preventing both shirking and opportunism. Basic fairness norms, for example, are widely recognized in the labor setting, such as those encapsulated by the old saying “a fair day’s work for a fair day’s pay.” Adherence to such norms is both moral and rational.

If denying employees the right to participate in corporate decisions directly harms them or denies them essential protections against other forms of injury, management may have an ethical obligation to permit such participation. Marshall Sashkin contends that denying employees the right to participate does injure them psychologically.<sup>484</sup> His argument depends, however, on the assertion that employees have a basic human need to participate in decisions that affect them. As I demonstrated in Part II, this line of argument lacks traction.<sup>485</sup> Even if Sashkin’s empirical assumptions about human needs were valid, moreover, it is not clear that the purported psychological harm caused employees by a denial of participation rights rises to an ethically cognizable level:

If one never were to do anything that might psychologically harm another person, a supervisor would be prohibited, for example, from refusing to hire someone who lacked crucial skills, firing a dishonest employee, redesigning a job in a way that somebody did not like, or requiring an employee to meet quality or service standards that were higher than his or her personal ones.<sup>486</sup>

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482. See Sashkin, *Participative Management*, *supra* note 141, at 16 (citing view of philosopher Gregory Boudreaux that management should be responsible for “reasonably predictable consequences” of its actions and asserting that “this seems to me to be a reasonable minimal ethical requirement for the practice of management”).

483. See *id.* (“[O]ne is obliged both to prevent harm and to rectify the negative consequences of one’s actions, when those consequences were reasonably predictable.”).

484. See *id.* (arguing that failing to satisfy basic human work needs harms employees psychologically).

485. For a discussion of Sashkin’s argument, see *supra* notes 222-24 and accompanying text.

486. Locke et al., *supra* note 143, at 76.

To be sure, an ideal ethical system might seek to prevent any harm, irrespective of its magnitude. Given the above-noted limits of positive law in a fallen society, however, the law inevitably ignores de minimis harms. As such, I do not regard the natural law principle against doing harm as having significant justificatory force in this context. Instead, the moral claim that employees are entitled to participate in firm decisionmaking must rest on their natural right to self-defense.

The right of self-defense is a basic principle of most Western ethical systems. It is also a basic element of human nature. In the workplace, this tends to translate into workers' recognition of their need for protection against management opportunism: "[W]orkers in the West seem less concerned to manage the organizations they work in than to defend their interests against those who manage them, whether the organizations are in 'private' or in 'public' hands."<sup>487</sup> Because of the disparities of power in the employment setting, however, self-defense by workers against managerial opportunism typically requires some form of collective action. Taken together, these considerations justify the conclusion that employees have a natural right to unionize and to bargain collectively with their employers. The Catholic Church has long (and I think correctly) asserted the existence of such a right.<sup>488</sup>

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487. Plamenatz, *supra* note 157, at 298.

488. See GAUDIUM ET SPES, *supra* note 300, ¶ 68.1, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 203 (stating that "[a]mong the basic rights of the human person is to be numbered the right of freely founding unions for working people"); see also BISHOPS' LETTER, *supra* note 39, ¶¶ 10-27, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, app. (discussing need for stronger institutional protections for workers in firms); CENTESIMUS ANNUS, *supra* note 2, ¶ 35, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 459 ("Here we find a wide range of opportunities for commitment and effort in the name of justice on the part of trade unions and other workers' organizations.").

Although I am generally satisfied that employees have a natural right to act collectively, I want to note a possible counter-argument based on scripture. See 1 Peter 2:18-24 (calling for servants to be submissive to masters). The apostle counsels slaves to submit to their masters, even "those who are harsh." *Id.* Citing Christ's example as the suffering servant, Peter suggests that patient endurance of injustice is part of the Christian's obligation. See *id.* (noting that when individuals suffer patiently, they have God's approval). Translated to the modern employment setting, this passage implies an obligation for workers likewise to submit to injustices by their employers. Recognizing that doing so requires a level of virtue verging on the heroic, however, I am inclined to regard the apostle's call as being aspirational and impractical as a governing norm for a fallen society.

Recognizing the potential of unions to protect worker interests and the legitimacy of their role in doing so, however, does not mean that we should give unions the unqualified endorsement offered by the Bishops. See GAUDIUM ET SPES, *supra* note 300, ¶ 68.1, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 203 (stating that unionization is basic right); see also BISHOPS' LETTER, *supra* note 39, ¶ 300, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, app. (discussing potential protection for workers); CENTESIMUS ANNUS, *supra* note 2, ¶ 25, reprinted in PROCLAIMING JUSTICE & PEACE, *supra* note 2, at 450 (citing beneficial effects of unions). The *Bishops' Letter* wholly ignores the risk that cooperating groups, including unions, may exert their self-interest in ways that border on monopoly. See Benne, *supra* note 465, reprinted in THE CATHOLIC CHALLENGE, *supra* note 39, at 81

Recognizing a natural right to collective action by workers is also justifiable on efficiency grounds, which helps it meet Finnis's test of practical reasonableness.<sup>489</sup> A once dominant view of unions asserted that their primary purpose was to capture monopoly rents for workers in the form of higher wages and superior benefits.<sup>490</sup> More recent work, however, suggests that unions serve a transaction cost economizing function.<sup>491</sup> Although firms may sometimes have *ex post* incentives to appropriate firm-specific investments by workers, the plausible assumption that workers value job security holds out the prospect of reduced labor costs *ex ante* if firms can credibly promise to refrain from subsequent appropriations. A firm that makes such a promise can bond it by signing a collective bargaining agreement with a union.

During the unions' prime, many mechanisms of employer opportunism, such as job reclassifications, automation and plant closings, were foreclosed to managers because such actions were the subject of mandatory bargaining between the employer and its unions.<sup>492</sup> In addition, unions provided a variety of permanent structural protections against employer opportunism, such as severance pay, grievance procedures and promotion ladders.<sup>493</sup> Finally, the union-based collective bargaining system provided monitoring and enforcement mechanisms through the grievance and arbitration systems.<sup>494</sup> An old saying nicely captures this allocation of managerial and union functions: "[M]anagement acts, and

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(stating that Bishops' enthusiasm for partnership and participation is too uncritical). Basic interest-group political theory tells us that unions may use their political power to feather their own nests at the expense of society as a whole. *See id.* (discussing harmful effects of unions on overall position of nation). Milton Friedman has forcefully argued, for example, that the union-supported Davis-Bacon Act, 40 U.S.C. § 276a to a-5 (1994), has had negative economic repercussions for African-Americans and other minorities. *See Friedman, supra* note 463, *reprinted in* THE CATHOLIC CHALLENGE, *supra* note 39, at 103 (stating that "[g]overnment support of trade unions has reduced the opportunities available to the disadvantaged").

489. *See generally* Caryn L. Beck-Dudley & Edward J. Conry, *Legal Reasoning and Practical Reasonableness*, 33 AM. BUS. L.J. 91, 93 (1995) (stating that their purpose is "to develop a framework for legal reasoning based on John Finnis' conception of 'practicable reasonableness'" and "to demonstrate how an inclusive natural law framework can be used in 'redrafting' a U.S. Supreme Court decision on a business issue").

490. *See* WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 321, at 252 (stating that dominant view of unions is that their main purpose is to raise wages, and that this function has been referred to as "the monopoly face of unionism").

491. *See id.* at 254-56 (describing efficiency-based functions of unions).

492. *See* Stone, *supra* note 340, at 89-90 (discussing *Fibreboard v. NLRB*, 379 U.S. 203 (1964)).

493. *See* Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1208 (1993) [hereinafter Williamson, *Governance*] ("The grievance machinery and associated job structures—ports of entry, promotion ladders, bumping, and so forth—are thus important parts of efficient governance.").

494. *See* KOCHAN ET AL., *supra* note 15, at 83 (stating that grievance and arbitration procedures perform function of managing conflicts and excusing procedural adjudication of individual rights at workplace).

workers and their unions grieve.”<sup>495</sup> All of this served to make the firm’s basic promises more credible.

Changes in the law that reduced the scope of mandatory bargaining,<sup>496</sup> and the declining strength of private sector unions, have largely eliminated these traditional sources of protection against managerial opportunism. As Oliver Williamson observes, however, the mutual interest of workers and firms in the transaction cost benefits of unionization should have, and sometimes did, lead to the development of company unions before they were outlawed by the Wagner Act.<sup>497</sup> If the current legal ban on company unions was lifted, might participatory management programs evolve into de facto company unions that could take over some of the functions traditionally performed by adversarial unions? I see no evidence that participatory management today serves to protect workers from appropriation of firm-specific human capital or, for that matter, from any other form of management exploitation. Nor do I see any evidence that it is evolving in that direction. Full development of these themes is unnecessary here, however, because I have dealt with them elsewhere.<sup>498</sup> Instead, I turn now to considering whether government-mandated employee involvement might turn the trick.

One can concede both that workers are vulnerable to employer opportunism and that workers have a right to defend themselves against such conduct without having to concede that workers have a right to participate in corporate decisionmaking. My argument has several parts. First is an empirical claim that managerial opportunism is probably rare. If so, government-mandated participatory management cannot be justified on this ground, lest the “tail wag the dog.” Second, employee participation creates perverse incentives. Third and finally, despite claims to the contrary by promandate scholars, employees are adequately protected through other contractual and legislative means that do not present the same sort of moral hazard.<sup>499</sup>

Conceding that firms have a variety of incentives to appropriate the quasi-rents generated when employees invest in firm-specific human capital, I nevertheless suspect that opportunistic breaches of implicit contracts are probably rare.<sup>500</sup> Many employees simply do not have significant firm-

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495. *Id.* at 27.

496. See Stone, *supra* note 340, at 90-91 (citing cases involving numerous issues that courts have found not to be within scope of bargaining).

497. 29 U.S.C. §§ 151-168 (1994); see WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 321, at 255 (discussing developments of “company unions” in pre-Wagner Act era).

498. See Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (finding that participatory management does not serve to protect workers).

499. See, e.g., Greenfield, *supra* note 477, at 301 (noting that workers have less protection against managerial opportunism than shareholders).

500. See O’Connor, *Human Capital Era*, *supra* note 17, at 909-10 (discussing enforcement mechanisms that ensure implicit employment arrangements are fulfilled, including “job market falls”).

specific human capital that is subject to expropriation.<sup>501</sup> With regard to such employees, there are no implicit contracts to be breached. Indeed, given current economic trends, there appears to be a decreasing number of such implicit contracts with which we need to be concerned. In many front-line industries, skills evolve so rapidly that the skills of even quite young employees become obsolete and they are replaced by still younger workers.<sup>502</sup> This seems like the extreme case of the promandate argument that workers whose investments are in firm-specific human capital are exploited almost immediately, rather than at the end of a long career.<sup>503</sup> In fact, it has led to a situation in which the old implicit contract between workers and companies, in which workers traded loyalty for job security, is "nearly dead."<sup>504</sup> Instead, the labor relationship is increasingly viewed as temporary by both sides. Job mobility is increasingly more common than job security.<sup>505</sup> In such an environment, workers seem more likely to develop general human capital rather than firm-specific human capital and, therefore, implicit labor contracts may never come into existence.<sup>506</sup>

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501. See Edward B. Rock & Michael L. Wachter, *Labor Law Successorship: A Corporate Law Approach*, 92 MICH. L. REV. 203, 233 (1993) [hereinafter Rock & Wachter, *Labor Law Successorship*] (distinguishing between external labor market and internal labor market). The point is not that such employees have no firm-specific capital. See *id.* (stating that there is little potential for rent seeking in external labor market). It has been argued that internal labor markets (the intra-firm employment relationship) necessarily entail "a bilateral monopoly with considerable potential for rent seeking." *Id.* Both firms and workers make transaction-specific investments, which are lost if the relationship is terminated. See *id.* (noting that this occurs once investments are "tied together" in internal labor market). Moreover, information about the relationship is asymmetrically distributed. See *id.* "Firms have private information about product markets and conditions and available technologies while workers have information advantages concerning their own work effort and opportunity wages if a new job were sought." *Id.* One can concede all of this without conceding the proposition that this results in "considerable" risk of rent seeking. See *id.* ("As a result, the ILM, unlike the ELM, is not a competitive market, but, rather, is better modeled as a bilateral monopoly with considerable potential for rent seeking."). There necessarily is a question of degree here.

502. See Brian O'Reilly, *The New Deal: What Companies and Employees Owe Each Other*, FORTUNE, June 13, 1994, at 44, 50 (describing lack of job security presently encountered by many workers in competitive markets and offering statistics concerning percentages of employees reporting their relative level of job security).

503. See Craver, *supra* note 456, at 156 ("Congress now should provide rank-and-file employees and lower level managers with fundamental employment dignity and true industrial democracy. Fulfilling this objective requires federal legislation mandating appropriate employee involvement.").

504. O'Reilly, *supra* note 502, at 44.

505. See *id.* at 44-45 (describing emergence of new relationships between employers and employees, requiring new forms of commitments by both partners).

506. Although some may find this market trend deplorable, it may actually be economically rational for workers as well as firms. Consider the classic dichotomy between exit and voice. Participation rights (voice) is neither a necessary nor even desirable response to oppression so long as exit is an option. To be sure, investments in firm-specific human capital raise the cost of exit. Meaningfully exercising

As to those employees who do make significant investments in firm-specific human capital, firms have a strong *ex ante* incentive to provide such employees with meaningful protections against the firm's *ex post* incentive to expropriate the resulting quasi-rents.<sup>507</sup> There must be some credibility to the firm's promise of job security. Otherwise, fear of losing their investment in firm-specific human capital will lead employees to *ex ante* decide on a suboptimal level of investment in such capital. As such, it is not in the firm's best interest to breach firm-specific human-capital implicit contracts.<sup>508</sup>

In many cases, employees can reduce the firm's incentives to breach implicit employment contracts by investing their own resources in developing their firm-specific human capital. The employee most obviously pays for training by investing time and effort in the project. He or she also does so, however, by accepting a wage that is lower than the wage that someone with his or her new skills could obtain in a competitive labor market. In this way, employees receive some protection against opportunistic conduct by management because the employer would lose money by terminating them.<sup>509</sup>

Even if opportunism is common, it would not necessarily follow that the law ought to prevent it. For example, it seems probable that managers have greater investments in firm-specific human capital than do produc-

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voice, however, requires a greater investment in firm-specific human capital, creating a vicious circle. As exit becomes a progressively less attractive option, greater voice becomes necessary, which makes exit increasingly less attractive. The wise employee *ex ante* would opt for a labor market variant of the Wall Street Rule: It is easier to switch than fight.

507. Misbehavior by management may lead to employee retaliation, such as "work to the rule" slow-downs. Management opportunism also increases labor costs in the form of the higher wages that a known cheater must pay to attract new workers. Moreover, even in some final period situations, there is still an incentive to behave honorably to maintain one's reputation for fair dealing. One suspects that managers "seek to keep [those commitments], both for reasons of personal honor and for reasons of continuing to solicit devoted duty from other employees." Harold Demsetz, *The Theory of the Firm Revisited*, 4 J.L. ECON. & ORG. 141, 154 (1988) [hereinafter Demsetz, *Theory of the Firm*].

508. In any event, the incentive firms have to breach implicit labor contracts is offset to some extent by the comparable incentives employees have to breach those same contracts. Firms that invest in training and education of workers develop both the workers' firm-specific and general-human capital. In economic terms, these investments are a sunk cost from which the employer expects to derive quasi-rents. Because employers have a very limited ability to bind employees to the firm, however, employees could appropriate the value of those quasi-rents by moving to a new job at a higher wage that reflects their more valuable human capital. Unless one believes that employer breaches are empirically more common or morally more worthy of condemnation, there is no moral justification for intervening to protect only one side of the equation.

509. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 192, at 330 (discussing employment at will and creation of job security). The costs of recruiting and training a new worker would further deter the employer from opportunistic conduct. See WEILER, *supra* note 164, at 145-47 (discussing significant costs incurred by employers in recruiting and training new workers).



tion employees. Evidence of the importance of firm-specific human capital to managerial employees is provided by the fact that senior managers tend to be "home-grown," having spent thirty years or more with their firm.<sup>510</sup> In theory, this should give managers an even stronger claim to protection of their implicit contracts than is the case with respect to production workers. Yet, even as it applies to managerial employees, the law does not prevent all breaches of those contracts. In corporate takeovers, for example, it is top and middle managers, not production employees, who are most likely to lose their jobs.<sup>511</sup> Although the law has given managers some significant tools with which to fight hostile takeovers, it has not given them *carte blanche*.<sup>512</sup>

One reason courts have been loath to give managers free rein to resist hostile takeovers is a concern that management resistance is likely motivated by selfish interests rather than the best interests of the enterprise's many constituents.<sup>513</sup> Proposals to mandate employee involvement are likewise suspect because of the conflicts of interest inherent in employee participation. In making their case for employee involvement, the Bishops naively assumed that the introduction of participatory practices would do away with conflicts of interest within firms.<sup>514</sup> In fact, however, mandatory employee involvement will likely result in a substantial increase in agency costs.

The analysis herein again focuses on proposals to mandate employee representation on the board of directors, such as that found in the German system of codetermination.<sup>515</sup> The most obvious source of concern

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510. See Sherwin Rosen, *Transaction Costs and Internal Labor Markets*, in *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 75, 77 (Oliver E. Williamson & Sidney G. Winter eds., 1991) ("Top-level executives in major U.S. corporations are mostly 'home grown,' having spent thirty years or more with their firms in lesser positions before breaking into the top echelons.").

511. See Roberta Romano, *A Guide to Takeovers: Theory, Evidence and Regulation*, 9 YALE J. ON REG. 119, 141 (1992) [hereinafter Romano, *A Guide to Takeovers*] (stating that "it is middle management . . . and not production plant employees, whose ranks are slimmed down after acquisitions"). Indeed, some data suggest that takeovers increased union member wealth. See *id.* ("Rosett tests Shleifer and Summers' breach of contract explanation more directly by examining union wage contracts before and after takeovers. He finds no support for their thesis: there is, in fact, a positive gain in union wealth levels after hostile acquisitions."). Given that takeovers are the transactional context in which exploitation of labor is most often alleged to exist, these data undercut the exploitation argument.

512. See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (stating that "[a] corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available").

513. See *id.* (recognizing inherent conflict of interest when managers resist takeovers).

514. See Benne, *supra* note 465, reprinted in *THE CATHOLIC CHALLENGE*, *supra* note 39, at 81 (labeling Bishops' suggestions as "disturbing").

515. I do not propose to defend herein either the proposition that only shareholders should be entitled to elect the board or that managers should owe fiduciary duties only to shareholders. I have offered my views on those issues elsewhere. See generally Bainbridge, *Organizational Failures Analysis*, *supra* note 10 (providing

in such proposals is the possibility that employee representation will permit management to pursue its own self-interest, at the expense of both shareholders and employees, by playing worker and shareholder representatives against each other. Legal and market accountability mechanisms constrain this tendency, but because they are not perfect, there remains the possibility that self-interested managers may throw their support behind the side of the board whose interests happen to coincide with those of management in the issue at hand.<sup>516</sup> Because employee representation on the board weakens a key accountability mechanism, as developed below, this conflict is especially serious.

This conflict is well-known, but there is a more subtle problem that is often overlooked. Corporate employees have an incentive to shirk so long as their compensation does not perfectly align their incentives with those of the firm's shareholders. In turn, knowing of this phenomenon, the firm's shareholders should expect management to reduce the compensation of the firm's employees by the amount necessary to offset the expected degree of employee shirking. Because *ex ante* wage adjustments are rarely fully compensatory, however, the firm's shareholders should expect management to monitor the employees and punish *ex post* those detected to be shirking.<sup>517</sup> Would it not seem odd that those who are to be monitored should be allowed to choose the monitors? One of the accountability mechanisms that aligns managerial and shareholder interests is monitoring by the board of directors. Allowing employee representation on the board reduces the likelihood that the board will be an effective monitoring device. Workers have an interest in supporting rules that free management from oversight by shareholders.<sup>518</sup> "Capital could seek profits by getting highly motivated managers who sweat the labor force."<sup>519</sup> Therefore, managerial shirking of its monitoring responsibilities often will redound to the workers' benefit, which suggests that employee representatives on the board of directors are less likely to insist on disciplining lax managers than are shareholder representatives. If employees are entitled to voting representation on the board of directors, we would expect moni-

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explanation for reason shareholders enjoy voting rights and discussing fiduciary duties); Bainbridge, *Participatory Management*, *supra* note 5, at 657 (discussing rise of participatory management); Bainbridge, *Shareholder Wealth*, *supra* note 318, at 1426 (discussing shortcomings of Green's model).

516. See William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385, 420-24 (1990) [hereinafter Carney, *Defining Constituencies*] (discussing managerial behavior along with loss of accountability and last period problems).

517. See Benjamin Klein, *Contracting Costs and Residual Claims: The Separation of Ownership and Control*, 26 J.L. & ECON. 367, 368 n.2 (1983) (stating that "in many cases letting the agent shirk and discounting his wage will not be an economical solution because the gain to the shirker and therefore his acceptable compensating wage discount is less than the cost to the firm from the shirking behavior").

518. See ROE, *supra* note 366, at 44 (stating that "[w]hen law creates gaps in the responsiveness of managers to capital, then managers have less incentive to squeeze every penny of production out of labor").

519. *Id.*

toring by the board and its subordinate managers to be less effective, which in turn we would expect to cause an increase in agency costs.<sup>520</sup>

The prediction that agency costs rise when employees are represented on the board is supported by evidence from the German experience with codetermination.<sup>521</sup> It is widely reported, for example, that labor's presence on the supervisory board impedes cost-cutting measures that adversely affect workers.<sup>522</sup> Codetermination is also said to impede the market for corporate control, an important accountability mechanism for U.S. firms, by making hostile takeovers more difficult.<sup>523</sup>

Proponents of government-mandated employee involvement could concede the existence of this conflict of interest without conceding that it falsifies their argument; and they would have a point. To say that someone has a conflict of interest is to describe the state of being in which they find themselves, but it does not connote blameworthiness. In general, corporate law does not prohibit transactions because one party has a conflict of interest; it merely polices such transactions. Promandate scholars and theologians might argue that the law should do the same with regard to employee involvement. This is fair enough, but while corporate law tolerates many conflicts of interest, the benefits of doing so ought to outweigh the costs. The preceding analysis suggests that the costs of employee representation are high. The analysis that follows suggests that the benefits, both to shareholders and workers, are small.

Although it is sometimes asserted that employee representation would benefit the board by promoting "discussion and consideration of alternative perspectives and arguments,"<sup>524</sup> there is reason to doubt

520. See Fama & Jensen, *supra* note 443, at 304 (stating that "[c]ontrol of agency problems in the decision process is important when the decision managers who initiate and implement important decisions . . . do not bear a major share of the wealth effects of their decisions" and that "[w]ithout effective control procedures, such decision managers are more likely to take actions that deviate from the interests of residual claimants"). This argument is a specific application of Fama and Jensen's thesis that agency costs in complex organizations are reduced when decision management is separated from decision control. See *id.* (discussing relations between risk bearing and decision process of organizations).

521. See ROE, *supra* note 366, at 213 (stating that "codetermination is a counterweight to capital" in German boardrooms, in which employees comprise exactly half of supervisor boards' seats).

522. See *id.* at 214 (comparing American and German ideological traditions and effect of codetermination on German corporate governance); Hopt, *supra* note 350, at 208 (discussing possible effects of labor codetermination on outcome of decisionmaking); Romano, *A Cautionary Note*, *supra* note 379, at 2031 (stating that "[t]here is some anecdotal evidence that codetermination is not the ideal arrangement from the shareholders' perspective").

523. See ROE, *supra* note 366, at 214 (citing one explanation for failure of German firms to reincorporate elsewhere in response to codetermination); Hopt, *supra* note 350, at 213 (discussing German tendency to shy away from codetermination).

524. Robert Howse & Michael J. Trebilcock, *Protecting the Employment Bargain*, 43 U. TORONTO L.J. 751, 769 (1993).

whether those benefits are very significant. Michael Dooley opines that workers will be indifferent to most corporate decisions that do not bear directly on working conditions and benefits.<sup>525</sup> "As to the majority of managerial policies concerning, for example, dividend and investment policies, product development, and the like, the typical employee has as much interest and as much to offer as the typical purchaser of light bulbs."<sup>526</sup> Dooley's argument is supported by a number of empirical studies. John Witte's case study, for example, found that workers who did not desire participation often cited a lack of managerial expertise as the reason.<sup>527</sup> John Cotton's review of the literature concluded that participatory management is most effective when it is directed at "one's everyday work, not [at] deciding policy issues of the entire organization."<sup>528</sup> Sagie and Koslowsky found that subordinate participation in tactical decisions (those dealing with working methods), as opposed to strategic decisions (those dealing with the initiation of a new product or service), was a better predictor of an increase in change acceptance, work satisfaction, effectiveness and time allotted to work.<sup>529</sup> All of this tends to suggest that employee representatives add little to the board except increased labor advocacy.

Employees also do not appear likely to benefit significantly from mandatory representation on the board. Instead, employees probably get greater benefits from other forms of protection. Indeed, just as I argued above that participatory management is unlikely to encourage worker productivity or reduce worker alienation, I am likewise doubtful of its ability to protect workers from managers determined to behave opportunistically.

Consider, for example, the rule proposed by Ronald Green requiring that employers "elicit the advice and consent of employees" before making major corporate decisions that affect the employees.<sup>530</sup> Green never

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525. See Michael P. Dooley, *European Proposals for Worker Information and Codetermination: An American Comment* [hereinafter Dooley, *American Comment*], in HARMONIZATION OF THE LAWS IN THE EUROPEAN COMMUNITIES: PRODUCTS LIABILITY, CONFLICT OF LAWS, AND CORPORATION LAW 128-29 (Peter E. Herzog ed., 1983) (arguing that typical employee of corporation does not have much interest in majority of managerial policies).

526. *Id.* at 129; accord Locke et al., *supra* note 143, at 70 (noting that including employees in decisionmaking for which they lack information leads to poor decisions and bad morale).

527. See WITTE, *supra* note 162, at 36-37 (discussing reasons that workers do not support participation).

528. COTTON, *supra* note 14, at 233; see *id.* at 235 (discussing ideal employee involvement program).

529. See Abraham Sagie & Meni Koslowsky, *Organizational Attitudes and Behaviors as a Function of Participation in Strategic and Tactical Change Decisions: An Application of Path-Goal Theory*, 15 J. ORG. BEHAV. 37, 38-39 (1994) (reporting results of increased employee participation in tactical decisionmaking).

530. GREEN, *ETHICAL MANAGER*, *supra* note 477, at 191. Green's argument differs from the usual secular humanist line of reasoning. Green contends that a moral basis for this asserted right can be found in an ethical framework that he calls neutral, omnipartial rule-making, which in this context requires one to ask the question, "How would I or any other omnipartial rational person feel about

makes entirely clear how a right to advise and consent would operate.<sup>531</sup> If we focus on the advice element of the rule, it would be limited to, for example, providing a formal mechanism for employees to provide input during the decisionmaking process. 'A right to participate in this fashion is essentially meaningless. So long as the final decision rests with management, employee input cannot prevent opportunistic behavior. Certainly, having their voices heard may give the employees a "warm and fuzzy" feeling, but that feeling is unlikely to last very long if management goes forward with its opportunistic plans. If we take seriously the consent element of Green's rule, however, it effectively becomes a veto on management decisionmaking. An apt analogy may be made to the Senate's power to advise and consent to presidential appointments.<sup>532</sup> The power to advise

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living in a world governed by the moral rules implicit in [the employer's] conduct?" *Id.* at 188. An "omnipartial" person approaches competing claims with "engaged, involved neutrality and evenhandedness." *Id.* at 189. Green asserts that the risk that unilateral employer decisionmaking may lead to abuse of employees justifies his rule under that standard. *See id.* (introducing his revised proposed moral rule by stating "[b]ut there is another, more direct way of limiting abusive conduct in this area"). I have serious doubts about the utility of Green's methodology. It is inherently subjective. Outcomes will largely rest on how the question is posed and who is asked to answer it. In an earlier exchange on the related issue of stakeholder rights, for example, Green and I suggested quite different answers to the same question. Compare Bainbridge, *Shareholder Wealth*, *supra* note 318, at 1423 ("Our hosts nonetheless posit . . . that the shareholder wealth maximization norm is both descriptively and normatively deficient. Frankly, I'm not persuaded."), with Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1413-14 (1993) [hereinafter Green, *Shareholders as Stakeholders*] (demonstrating misunderstood realities of shareholder-management relationship, including assertion that "shareholders have no right to control the use of corporate assets" and fact that limited liability contributes to lack of shareholder commitment). As such, Green's approach is poorly suited to the task of determining whether employee participation constitutes a moral norm as that term is used herein. *See* GREEN, *ETHICAL MANAGER*, *supra* note 477, at 191 (admitting that "within a framework establishing the basic moral principle of employee advice and consent in pension matters, each of these questions requires more focused moral analysis"). In fairness, however, that does not appear to be a task Green has undertaken. *See id.* ("We need not anticipate all this thinking here. More important is our grasp of the basic reasoning leading to a high-level moral norm of this sort.").

531. *See* GREEN, *ETHICAL MANAGER*, *supra* note 477, at 191 (asserting revised proposed moral rule requiring advice and consent of employees without explaining such processes). As Green recognizes, his bare bones moral rule would need to be considerably fleshed out before being implemented as a legal norm. *See id.* ("A basic moral rule of this sort leaves many practical questions unanswered . . . for one thing, there is the question of what 'advice and consent' means."). Perhaps an even more serious flaw is Green's failure to specify the situations in which a right to participate would arise. *See id.* (applying proposed moral rule only to specific situation of pension fund negotiation without discussing crossover into any other potential area of conflict).

532. *See* U.S. CONST. art. II, § 2 (establishing Senate's role in confirming Cabinet nominees and other executive officers). *See generally* William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123, 1129-30 (1998) (discussing interpretations of Appointment Clause).

is given teeth by the power to consent, without which the appointee may not take office. In view of the conflict of interest identified above, a worker veto would create serious hold-out problems. Workers would be empowered to behave opportunistically by withholding their consent from management proposals without some form of sidepayment.

The economic and political unfeasibility of a worker veto is forcefully illustrated by the experience with German codetermination. Although codetermination gives German workers greater board representation than any U.S. form of employee involvement, the German legislature has been unwilling to give workers a veto. As already noted, shareholders retain a slight (but critical) numerical advantage on the board. Moreover, German managers sometimes deprive the supervisory board of information because they do not want the supervisory board's employee members to learn it.<sup>533</sup> Alternatively, the board's real work is sometimes done in committees or de facto rump caucuses from which employee representatives are excluded.<sup>534</sup> As a result, while codetermination raises the costs of decisionmaking, it may not have much effect on substantive decisionmaking. This prediction is borne out by the Scandinavian experience with codetermination, where it reportedly has had little substantive effect on corporate decisionmaking.<sup>535</sup> Absent a veto, however, workers would be better advised to rely on self-help (exit or work to rule slow-downs), contracts and general welfare legislation for protection against management opportunism.

Kent Greenfield recently opined, in contrast, that "[i]t would hardly seem obvious to most people, especially to most workers, that employees have greater ability to protect themselves from managerial exploitation than do capital investors."<sup>536</sup> Having weighed in on the contractarian side of this debate elsewhere, however, I shall not delay the reader by rehashing those arguments here.<sup>537</sup> Instead, I pause only to make a point that I have not made elsewhere; namely, that the risk that a firm will appropriate quasi-rents created by employee investments in firm-specific human capital at most argues for some protection against coerced, mid-stream changes in explicit and implicit contracts making up the corporate

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533. See ROE, *supra* note 366, at 177 (giving examples of effects of German codetermination); Hopt, *supra* note 350, at 206 (stating that tendencies exist to keep information given to supervisory board at low level).

534. See Summers, *Codetermination*, *supra* note 14, at 166 (discussing exclusion of employee representatives from real decisionmaking process).

535. See Tove H. Hammer et al., *Worker Representation on Boards of Directors: A Study of Competing Roles*, 44 INDUS. & LAB. REL. REV. 661, 663 (1991) (discussing Scandinavia's experience with different forms of worker participation and labor's involvement in organizational decisionmaking).

536. Greenfield, *supra* note 477, at 314.

537. See generally Bainbridge, *Community and Statism*, *supra* note 191, at 858, 873-902 (characterizing contractarianism and discussing incompleteness of contract criticism); Bainbridge, *Participatory Management*, *supra* note 5, at 657 (characterizing firms as nexus of contracts).

employment relationship. A direct analogy is provided by the nexus of contract literature on corporate charter provisions. Virtually all contractarians agree that charter and by-law provisions adopted prior to the corporation's initial public offering are wholly unproblematic.<sup>538</sup> The capital markets readily can price such provisions, such that shareholders who purchase shares in the initial public offering can be treated as having accepted the terms of the corporate contract. There is somewhat less agreement about mid-stream changes in the charter or by-law provisions, as some contractarian scholars argue that shareholders can be coerced into accepting such changes.<sup>539</sup> These scholars argue for legal rules protecting shareholders against mid-stream changes.<sup>540</sup> The same rationale ought to apply to the labor market. Although competition in external labor markets fully protects employees at the time the employment relationship is created, a case might be made by analogy to the charter and by-law amendment debate for protecting employees who accept a position with a firm from subsequent changes in the conditions of employment. Ironically, this would argue against imposition of mandatory employee participation, because for many employees, participatory management would constitute a substantial change in their working conditions. In any case, the argument for giving employees a voice in corporate governance to protect them from adverse mid-stream changes is not robust. Even conceding *arguendo* that employees are powerless to bargain *ex ante* for protections against subsequent changes in their working conditions, why should one expect that a voice in corporate governance would provide much protection in this regard as long as employees lack a veto over such changes?

In any case, the argument against government-mandated employee involvement does not depend on the claim that workers are adequately protected either by contract or self-help. As private sector unions have declined, the government has intervened to provide, through general welfare legislation, many of the same protections for which unions once bar-

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538. See Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1820 (1989) [hereinafter Bebchuk, *Limiting Contractual Freedom*] (taking issue with "the increasingly influential view that companies should be completely free to opt out of corporate law rules by adopting appropriate charter provisions").

539. See Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1399 (1989) [hereinafter Bebchuk, *Debate on Contractual Freedom*] (outlining two sides of debate on contractual freedom mid-stream).

540. See *id.* at 1399-1404 (summarizing debate regarding contractual freedom in corporate law).

gained.<sup>541</sup> The Family and Medical Leave Act<sup>542</sup> grants unpaid leave for medical and other family problems.<sup>543</sup> The Occupational Safety and Health Act<sup>544</sup> mandates safe working conditions.<sup>545</sup> Plant closing laws require notice of layoffs.<sup>546</sup> Civil rights laws protect against discrimination of various sorts.<sup>547</sup>

This observation runs counter to Kent Greenfield's recent assertion that society reasonably might "decide to forgo the possibility of very high corporate profits in order to avoid the disproportionate harm workers (or communities, or creditors) would suffer if risky business decisions do not pay off."<sup>548</sup> Such arguments are a staple of the promandate literature, as well as related stakeholder literature, but they present a false dichotomy. Implicit in Greenfield's argument is the notion that incorporating codetermination and related stakeholder rights into U.S. corporate law is all that stands between workers and the poor house. Society could equally decide that corporate law ought to be concerned with maximizing shareholder value, however, while leaving worker protection issues to general welfare legislation in other areas.<sup>549</sup>

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541. See Geu & Davis, *supra* note 146, at 1696 (discussing congressional involvement in bargaining over prohibitions against hiring undocumented workers, unpaid medical leave, maintenance of reasonably safe workplace and advance notice of layoffs). Acknowledging the role of the state as a source of employee protection also raises the question of whether additional state intervention in the form of mandatory employee involvement is morally appropriate. The relevant principle again is sphere sovereignty, which argues against further expansion of the state's role. For a discussion of sphere sovereignty, see *supra* notes 469-74 and accompanying text.

542. 29 U.S.C. §§ 2601-2654 (1994).

543. See *id.* § 2612(a) (establishing entitlement to leave and expiration of such entitlement for reasons of birth or adoption of child, need to care for ill or close relative or serious health condition in employee).

544. 29 U.S.C. §§ 651-678 (1994).

545. See *id.* § 651 (stating congressional findings, declaring purposes and authorizing Secretary of Labor to set mandatory occupational safety and health standards).

546. See 29 U.S.C. § 2102 (1994) (requiring employer to issue 60-day written notice before plant closings and mass layoffs).

547. See 42 U.S.C. § 1983 (1994) (establishing liability for violation of civil rights provided for by Constitution and its Amendments).

548. Greenfield, *supra* note 477, at 310.

549. To be sure, general welfare legislation of the forms discussed is subject to much the same critique to which I have subjected proposals to mandate employee involvement. To forestall charges I am attempting to have my cake and eat it too, I make three observations. First, I am evaluating government mandated employee involvement against the backdrop of existing general welfare legislation, not critiquing that backdrop. Second, granting workers participation rights in light of the backdrop of general welfare legislation amounts to a second bite out of the apple. I have attempted to demonstrate that the costs associated with such a "second bite" outweigh the benefits, both in an economic and a moral sense. Third and finally, for the reasons developed below, I believe a sharp division between rules of corporate governance and general welfare legislation should be preserved.



Indeed, such an approach has much to commend it. A defense of shareholder wealth maximization as a moral norm might begin with pragmatic arguments about the size of the economic pie. Those who favor distributional concerns over wealth maximization often give short shrift to the positive effects of shareholder wealth maximization. In contrast, I prefer the old adage "a rising tide lifts all boats." Critics of neoclassical economics often fail to take into account the secondary, unintended effects of regulating economic activity. Because the secondary effects are often counter to and larger than the primary intended effects, more social legislation makes matters worse, not better. This is so, even if one rejects public choice-based arguments about the merits of regulation, because the law of unintended consequences inevitably follows from the bounded rationality of human minds. Accordingly, whatever distribution scheme society adopts, everyone is likely to be better off if the pie to be distributed is larger. From this perspective, wealth creation and distribution are two independent questions. Society's first task is to set up wealth maximizing rules to encourage wealth creation. Only then should society consider distributional questions. By separating corporate law, with its wealth maximization norm, from general welfare legislation, society appears to have struck just that balance.

#### V. CONCLUSION

Although many scholars have argued that employees have a moral right to participate in corporate decisionmaking, my analysis demonstrates that those claims are untenable. A natural right worthy of codification into positive law must be supported by one or more moral norms, satisfying two criteria—truth and substantial support in the relevant community. This Article has demonstrated that claimed participation rights fail both criteria. Insofar as the truth of such claims is concerned, none of the three most widely accepted sources of natural law supports them. Measured by the revealed truths of Judaic-Christianity, many of the arguments made in favor of such rights prove to be nonscriptural, while others are antithetical to Western religious tradition. When tested by the standards of practical reasoning, the claims lack both instrumental and noninstrumental justification. Finally, many of the arguments made in favor of such rights prove to be contrary to Western moral and political traditions. Insofar as community support is concerned, the empirical evidence indicates that many firms and workers remain unpersuaded by the merits of employee involvement. In the absence of a clearer community consensus, government mandates risk imposing a "one-size-fits all" standard of industrial relations that fails to fit many.